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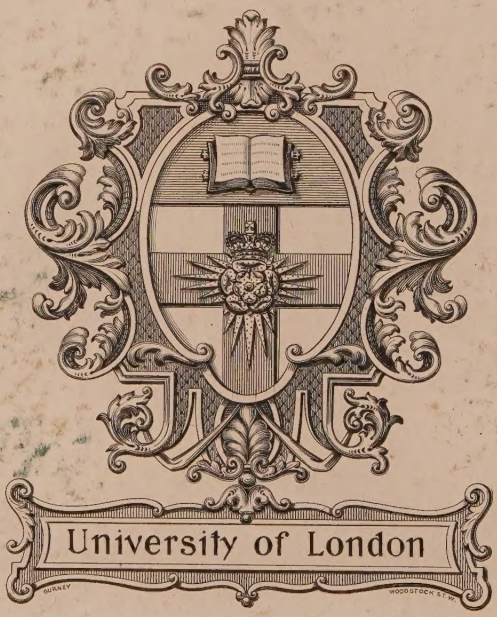

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1899. 1900.

[IN THE COURT OF APPEAL.]

C. A.
1899
Oct. 31.

THE RURAL DISTRICT COUNCIL OF DAVENTRY *v.* PARKER.

Highway — Repairable Ratione Tenuræ — Recovery of Expense of Repair — Person Liable—Owner not in Occupation—Local Government Act, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 25, *sub-s.* 2.

By s. 25, sub-s. 2, of the Local Government Act, 1894, "Where a highway repairable ratione tenuræ appears . . . . not to be in proper repair, and the person liable to repair the same fails when requested so to do . . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing":—

Held, that an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the meaning of the section.

Cuckfield Rural Council v. *Goring*, [1898] 1 Q. B. 865, approved.

APPEAL from a judgment of a Divisional Court.

The action was brought to recover a sum of money, being costs and expenses incurred by the plaintiffs in repairing two

C. A. 1899

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roads within their district which were alleged to be repairable by the defendant as owner of certain adjoining lands.

By an order made under Order XXV., r. 2, certain points of law raised by the pleadings were set down for hearing before the trial of the action. One of these was: "That the defendant, being the owner of the lands which are in the possession of his tenants, is not the person liable to repair the said roads." Another was: "That the defendant, being owner of the lands which are in the possession of his tenants, is not the person liable for the expenses of repairing the roads."

The Divisional Court (Wills and Bruce JJ.) directed judgment to be entered for the defendant.

The plaintiffs appealed.

Bray, Q.C., and *E. Morten*, for the plaintiffs. This is practically an appeal from the decision in *Cuckfield Rural Council* v. *Goring*. (1) It is not necessary to inquire whether originally an owner who was not also occupier could have been indicted. That point was left open in *Rex* v. *Sutton*. (2) It may well have been that the occupier was proceeded against because of the difficulty of getting at the owner. The liability for expense incurred by a district council in repairing a highway repairable ratione tenuræ is now regulated by s. 25, sub-s. 2, of the Local Government Act, 1894. The liability falls on the person really and ultimately liable, and a direct remedy is given against him. That person is the owner, who is under obligation to reimburse the occupier if the latter has been obliged to pay: *Baker* v. *Greenhill*. (3) Wills J., in *Cuckfield Rural Council* v. *Goring* (1), quotes the judgment of Lord Coleridge C.J. in *Reg.* v. *Barker* (4), which was founded on a passage in 1 Rolle's Abridgment under the heading "Chimin Common," B (2.); but that passage does not support the conclusion that the owner could not be indicted, for it does not refer to liability to repair ratione tenuræ, but to liability arising ratione clausuræ, to which different considerations apply.

[They cited also *Reg.* v. *Ramsden*. (5)]

(1) [1898] 1 Q. B. 865.
(2) (1835) 3 Ad. & E. 597; 42 R. R. 490.
(3) (1842) 3 Q. B. 148.
(4) (1890) 25 Q. B. D. 213.
(5) (1858) E. B. & E. 949.

Rowsell (with him *Macmorran, Q.C.*), for the defendant. There is no authority for saying that the occupier was proceeded against owing to the difficulty of getting at the owner. *Nottingham's Case* (1), cited in Viner's Abridgment, "Chimin Common," E 9, is to the effect that a man is not chargeable if he does not occupy his land, though it be his frank-tenement; but it was agreed that if a man suffers his land to lie fresh it shall not excuse him. In such a case, there being no tenant, the owner would be occupier, and therefore liable. So under the same heading, E 12, one of the objections to an indictment was that the person charged did not live there. The only case that makes against the defendant is *Baker* v. *Greenhill* (2); but that was a question of repairing a bridge, arising under a private Act. No doubt, under some circumstances, the owner may be liable to reimburse the occupier, but there is no statutory remedy against the owner, but only against the person liable to repair—that is, the occupier, as the only person who could have been proceeded against by indictment. The provision of s. 25, sub-s. 2, is not new, for it is to the same effect as the Highway Act, 1862 (25 & 26 Vict.), c. 61, s. 34, and no case has been cited shewing that an owner who is not an occupier has been proceeded against under that statute. Neither statute imposes a new liability; all that was done was to substitute a new method of enforcing the existing liability.

E. Morten, in reply.

LORD RUSSELL of KILLOWEN C.J. This case raises a narrow point which, for my part, I am disposed to deal with on the construction of the statute itself and without incumbering the case with what has been said in previous cases, except so far as they shew the state of the law before the statute was passed.

Before the Highway Act, 1862, which is the earliest statute on the subject that has been called to our notice, the uniform, if not the only, mode in which the repair of a road ratione tenuræ was enforceable was by indictment against the occupier, and no case has been brought to our notice in which an owner has been indicted, though there must have been many cases in

(1) 2 Roll. Rep. 412.

(2) 3 Q. B. 148.

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which there was an agreement between owner and occupier making the former liable as between themselves. In this state of things the Act of 1862 enabled a highway board to repair a highway and to recover the expense of so doing from the party liable to repair ratione tenuræ. This was intended to alter procedure, and not to shift from one to another a liability imposed by law. The s. 25, sub-s. 2, of the Local Government Act, 1894, is to the same effect. It says: "Where a highway repairable ratione tenuræ appears . . . . not to be in proper repair, and the person liable to repair the same fails when requested so to do . . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing." It is impossible to say on a fair consideration of the meaning of these words that the landlord or owner is made liable by them. Cases have been suggested during the course of the argument in which the liability might fall on the owner, as, for instance, if he has no tenant or has undertaken the liability by agreement with his tenant; but as to this latter instance, it is sufficient to say that a liability to repair is not the same, but is very different from an obligation to indemnify some one else who is liable to repair. In my opinion this appeal fails, and must be dismissed.

A. L. SMITH L.J. I am of the same opinion. The case of *Cuckfield Rural Council* v. *Goring* (1) was in my judgment rightly decided, and this appeal, which is practically against that judgment, must fail.

VAUGHAN WILLIAMS L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Kingsford, Dorman & Co., for W. F. & W. Willoughby, Daventry.*

Solicitor for defendant: *A. J. Harman, for H. F. Bennett, Banbury.*

(1) [1898] 1 Q. B. 865.

A. M.

In re CHRISTIE.
Ex parte CHRISTIE.

1899
Oct. 30.

Bankruptcy—Practice—Trustee's Remuneration—Resolution of Creditors—Ultra Vires—Composition Provided by Debtor's Father—"Amount realized by Trustee"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 72, *sub-s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-s.* 1.

Under s. 72 of the Bankruptcy Act, 1883, the remuneration of a trustee is to be fixed by a resolution of the creditors, and is to be a commission or percentage payable partly on "the amount realized" and partly on "the amount distributed in dividend"; and s. 15 of the Bankruptcy Act, 1890, enacts that the commission payable on the amount realized is to be payable "only on the amount realized by the trustee."

The creditors of a bankrupt accepted a composition, and the sum required to pay the composition was provided by his father and distributed by the trustee. The creditors also passed a resolution that the remuneration of the trustee should be a commission of "5 per cent. on all amounts brought to credit and 5 per cent. on all amounts distributed to the creditors." The trustee claimed the commission on the sum provided by the father as being an "amount brought to credit" of the estate:—

Held, that the resolution, not being in accordance with the terms of s. 72 of the Act of 1883, was ultra vires:

Held, also, that the words "the amount realized" in s. 72—apart from s. 15 of the Act of 1890—mean "the amount realized by the trustee"; that the sum provided by the father was not a sum "realized by the trustee," and, therefore, that the commission claimed was not payable.

Semble, the words "distributed in dividend" in s. 72 mean "distributed in dividend out of assets realized by the trustee."

THIS was an application which raised a question as to the amount of remuneration to which the trustee in bankruptcy was entitled.

In January, 1898, W. Christie was adjudicated a bankrupt, and a trustee was appointed with a committee of inspection.

In July, 1898, the bankrupt made a proposal to his creditors to pay in full all preferential claims and all costs, and also to pay on all unsecured debts provable in the bankruptcy a composition of 8*s.* in the pound, provided that the bankruptcy was annulled and his estate was vested in him or as he should direct.

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On September 2, 1898, the creditors passed a resolution accepting the bankrupt's proposal and appointing the trustee to receive and distribute the composition.

On October 7, 1898, the committee of inspection passed a resolution that the trustee should be allowed "a commission of 5 per cent. on all accounts brought to credit, and 5 per cent. on all amounts distributed to the creditors, other than preferential payments."

On October 11, 1898, the Court made an order approving the composition, annulling the bankruptcy, and vesting the bankrupt's estate in H. Christie, the father of the bankrupt; and on October 13 H. Christie paid to the trustee a sum sufficient to meet the costs, the preferential claims, and the composition. 5200*l.* of this sum was the amount required to pay the composition.

In January, 1899, the trustee distributed the composition. Subsequently he filed an account of his receipts and payments in which he claimed, by virtue of the above resolution, to retain as part of his remuneration the sum of 276*l.* 12*s.* 2*d.* as his commission of 5 per cent. "on moneys brought to credit." 260*l.* of the 276*l.* 12*s.* 2*d.* represented the commission on the 5200*l.* paid by H. Christie. The balance of 16*l.* 12*s.* 2*d.* was the commission on certain assets of the debtor which the trustee had got in and realized before the composition proposal was made. By the account the trustee also claimed to retain, as further part of his remuneration, the commission on the same 5200*l.* "distributed in dividend."

H. and W. Christie objected to the commission claimed on the 5200*l.* under "moneys brought to credit," and now applied that the trustee might be ordered to refund to them that 260*l.*

Younger, for the application. The resolution of the committee of inspection was ultra vires. They had no power to pass a resolution outside the language of s. 72 of the Bankruptcy Act, 1883. (1) The section says that the commission is to be

(1) The Bankruptcy Act, 1883, s. 72, sub-s. 1, enacts that "where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the

paid "on the amount realized," and then s. 15, sub-s. 1, of the Act of 1890 provides that it is to be payable "only on the amount realized by the trustee." The intention of the Legislature evidently is that the trustee is only to be remunerated for services actually rendered by him in realizing the estate. Here the 5200*l.* formed no part of the bankrupt's estate. It was a sum provided by the father to pay the composition, and cannot be said to be a sum "realized by the trustee," although it may be a sum "brought to credit" of the estate. The expression "brought to credit" seems to have been used in the resolution for the purpose of enabling the trustee to charge this commission, but it is not in accordance with the language of the Act. It is submitted also that the words "distributed in dividend" mean distributed in dividends by the trustee out of the assets realized by him. Therefore the trustee here is not entitled to the commission on the 5200*l.* distributed by him. But it is admitted that the trustee is entitled to some remuneration for his services, and therefore this point is not pressed.

Muir Mackenzie, for the trustee. There is nothing unusual in the words "brought to credit," It is a common form in bankruptcy and is synonymous with "realized." It is used in the Scale of Fees, Table B, under rules 305 and 306 of the Bankruptcy Rules, 1886, where the words "assets realized or brought to credit" occur. The procedure, therefore, was regular, and the resolution was perfectly valid. A resolution fixing the amount of the trustee's remuneration is in the nature of a statutory contract with which the Court will not interfere: *In re Marsden.* (1) Further, the trustee here gave up substantially the whole of the bankrupt's estate to the father

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creditors, or if the creditors so resolve by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend."

The Bankruptcy Act, 1890, s. 15, sub-s. 1, provides that "The part of the trustee's remuneration to be payable in pursuance of s. 72 of the principal Act on the amount realized shall be payable only on the amount realized by the trustee."

(1) (1892) 9 Mor. 70.

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in consideration of the 5200*l.* paid in by him to the credit of the estate. The negotiations for the composition were carried on between the trustee and the solicitors of the father, and it was through the exertions of the trustee that the creditors agreed to accept the composition. In substance it was a sale of the bankrupt's estate to the father, and the trustee rendered services in obtaining the 5200*l.* for the estate. He is, therefore, entitled to his commission.

Younger, in reply. In the case of *In re Marsden* (1) the resolution was in strict accordance with the terms of the Act.

WRIGHT J. It seems to me, looking at the language of the Acts, that, as regards the trustee's commission on the amount realized, the words "on the amount realized" in s. 72 of the Act of 1883—quite apart from the amendment contained in s. 15 of the Act of 1890—must be construed to mean "on the amount realized by the trustee in bankruptcy." The commission would naturally be given according to the success of the trustee in getting in and realizing the estate, and s. 15 of the Act of 1890 certainly does not detract from that construction. The object of the enactment evidently is to distinguish between assets realized by the trustee and assets realized by the official receiver. Now, here the trustee was appointed after the adjudication in bankruptcy, and he has realized a small portion of the estate on which he is entitled to the commission; but as to the rest, if it had been a sale to the father of the bankrupt's estate, I should agree with Mr. Muir Mackenzie that the trustee had realized those assets. But that is not the case here. The composition was paid out of a fund provided by the bankrupt's father, and the trustee was saved the trouble of realizing the estate. In my judgment, therefore, the trustee is not entitled to be paid commission on the 5200*l.* paid in by the father as a sum coming within the words "amount realized by the trustee." That being so, there must be an order on the trustee to refund the 260*l.* which he claims to retain as commission on the amount paid in by the father. I may add I have some doubt as to whether the words "distributed in

(1) 9 Mor. 70.

dividend" in s. 72 do not mean distributed in dividend "out of the assets realized by the trustee." But I will not decide that point now, as I understand that Mr. Younger does not object to the trustee receiving his commission on the amount of the composition distributed amongst the creditors. I quite agree, however, that creditors have no power to pass resolutions outside the language of the sections so as to enlarge the scope of the Act.

Solicitors for applicants: *Ridsdale & Co.*
Solicitor for trustee: *J. H. Solomon.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

1899

Nov. 2.

ROWELL *v.* ROWELL.

Husband and Wife—Separation—Agreement—Intercourse while Living Apart —Evidence of Cohabitation.

Husband and wife entered into a deed of separation under which the husband covenanted to pay a weekly sum to the wife during their joint lives if they should so long live separate from one another. While they were living apart, acts of connubial intercourse took place. In an action by the wife to recover arrears of payments due under the deed:—

Held, that the fact that intercourse had taken place was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect.

APPEAL from a judgment of Grantham J. at the trial of the cause without a jury.

The action was brought by the wife of the defendant to recover arrears of weekly payments under a deed of separation.

By a deed of separation, dated March 5, 1896, made between husband and wife, without the intervention of a trustee, it was recited that differences had arisen and that the parties had agreed to live separate from each other, and that there was one child of the marriage, a son. The deed witnessed that the defendant covenanted with the plaintiff that, so long as she should perform all the covenants and agreements on her part

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thereinafter contained, she might at all times thereafter, notwithstanding her coverture, live separate and apart from the defendant as if she were a feme sole, and should be freed from his control and authority, and should reside in such place and in such manner as she should think fit, and that the defendant would not require her to live with him or institute any legal proceedings for that purpose, or in anywise molest or interfere with her in her manner of living or otherwise, and would during the joint lives of himself and the plaintiff, "if they should so long live separate from each other," and the plaintiff should lead a chaste life and observe the covenants and agreements on her part thereinafter contained, pay to her the sum of 1*l.* 10*s.* per week for her sole and separate use without power of anticipation, and also during the life of the defendant, if his son should so long remain under the age of twenty-one years and reside with or under the tutelage or care of the plaintiff, and if she should so long perform and observe the stipulations on her part thereinafter contained, pay to her the further sum of 10*s.* per week for and towards the support, maintenance, and education of the son. The deed further witnessed that all the property of the plaintiff which but for this covenant would belong to or be receivable by the defendant in her right should be held and enjoyed by her for her sole and separate use, and that if she should die in the lifetime of the defendant all her property should go to the person or persons and in the manner to whom and in which the same would have gone if the defendant had died in her lifetime. The plaintiff covenanted that she would out of the provision made by the deed or otherwise support and maintain herself and discharge all her debts and liabilities, and that she would out of the further sum of 10*s.* a week thereinbefore agreed to be paid support and maintain the son and indemnify the defendant from all claims and liability on account thereof. She further covenanted not to molest or interfere with the defendant. From the date of the deed the wife lived at a boarding-house, which she had started, and she provided for the maintenance and education of the son. She was the only witness called at the trial, but some letters and a diary kept by the defendant were put in. It appeared that the

parties were on friendly terms, and met at times at the house of the plaintiff, and that they went occasionally to theatres and other places of amusement. In April or May, 1897, the defendant induced the plaintiff by representations about his health to consent to acts of intercourse. The plaintiff deposed that he did this without any suggestion on his part that there would be a return to cohabitation, and that no such idea was in her mind. The defendant continued to pay the allowance under the deed up to January 6, 1898, when it was stopped.

The defence raised at the trial was that the deed had been put an end to by the intercourse between the parties.

Judgment was entered for the plaintiff.

The defendant appealed.

Priestley (*McCall, Q.C.*, with him), for the defendant. The intercourse between the parties put an end to the deed, which only had effect during the contemplated separation. The evidence of coming together is inconsistent with the continuance of the separation. The strongest evidence of condonation is intercourse: *Campbell* v. *Campbell*. (1) In that case it is pointed out that condonation is connubial intercourse with full knowledge of all the facts. Such intercourse abrogates a decree of judicial separation: *Haddon* v. *Haddon*. (2) In like manner intercourse is the strongest evidence of the cesser of separation, and the deed of separation once put an end to by the parties coming together cannot be kept in suspense, but is absolutely at an end: *Westmeath* v. *Westmeath*. (3) This deed is an ordinary deed of separation, and not in any way a post-nuptial settlement, and the covenants came to an end when the separation ceased. This conclusion is not affected by the introduction of words making the deed take effect for the life of the wife: *Nicol* v. *Nicol*. (4) The deed being gone, the covenant as to the payment for the maintenance of the child has fallen through.

John Sinclair (*Witt, Q.C.*, with him), for the plaintiff. Isolated acts of intercourse do not constitute cohabitation, and

(1) (1856) Dea. & Sw. 285, at p. 288.

(2) (1887) 18 Q. B. D. 778.

(3) (1830) 1 Dow & Cl. 519; 35 R. R. 54.

(4) (1885) 30 Ch. D. 143.

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there is no case of a deed of separation being held to come to an end on that account. The separation contemplated by the deed has in fact subsisted all along, and it is clear that neither of the parties thought that the deed was at an end. The husband continued to make payments under the deed, and it was thereby kept alive: *Scholey* v. *Goodman*. (1) The conduct of a husband may prevent his taking advantage of acts which might otherwise be held to make the deed of no effect: *Webster* v. *Webster*. (2)

The deed is more than a mere separation deed, as it deals with the wife's separate estate; and, at all events, the covenant as to the payment for the support of the child still subsists, for the condition under which the payment is to be made continues, and he is still being supported by the mother.

McCall, Q.C., in reply.

LORD RUSSELL of KILLOWEN C.J. This case is by no means free from difficulty. It is an action on a covenant in a deed of separation between husband and wife. It was tried by a judge without a jury, and only one witness, namely, the wife, was called. The facts are that the plaintiff and defendant were not able to live together harmoniously, and they agreed to live separately under the terms of a deed entered into by them on March 5, 1896. Something has been said about the nature of the deed, but I think it is nothing but a deed of separation, and it is not necessary to take heed to observations made in cases where deeds had another and independent object. I wish to go through this deed to shew the grounds upon which I base my judgment. The deed recites that differences had arisen, that the parties had agreed to live apart, and that there was one child. Then follow covenants by the husband that the wife may notwithstanding her coverture live separate and apart from him, free from his control and from molestation or interference on his part. Then follows one of the covenants on which the action is brought, that the defendant will "during the joint lives of himself and the said Harriette Elizabeth

(1) (1823) 1 C. & P. 36.
(2) (1853) 22 L. J. (Ch.) 837; 1 Sm. & Giff. 489.

Rowell, if they should so long live separate from each other," pay to her the weekly sum of 1*l.* 10*s.* for her sole and separate use without power of anticipation. The other covenant sued on is that the defendant would during his life, if the son should so long remain under the age of twenty-one years and reside with or under the tutelage or care of the wife, pay to her the further sum of 10*s.* per week for his support, maintenance, and education. It is clear that there is not an absolute covenant either as to the 1*l.* 10*s.* or the 10*s.* As regards the former sum, the liability to pay would come to an end if the parties ceased to live separate; and as to the latter sum, the liability would cease if the son ceased to be under the tutelage or care of the mother. The deed then proceeds to protect the separate property of the wife, and then it contains covenants on her part to maintain herself and her son, and to indemnify the husband from all claims and proceedings on that account.

That being the deed, the conduct of the parties appears to have been that they lived apart, but according to the evidence on four occasions she had acts of connection with her husband, as it would appear, at a lodging-house that she kept. In addition to this, they seem to have met in a more or less friendly way. After these acts of intercourse in the middle of 1897 they continued to live apart, and the defendant continued to pay the amount he had covenanted to pay up to January, 1898. In my judgment, if the Court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed. The defendant is sued on his covenant, and the onus lies on him to shew that the deed no longer takes effect. It is important to consider the evidence on this point, and the plaintiff's uncontradicted evidence is that neither she nor her husband considered the deed was to be put an end to, and that he still went on paying her the weekly allowance under the deed. The position of things as disclosed by the evidence suggests this consideration: if the deed is no longer effectual, there would be no liability on the defendant, other than his common law liability, to support his child, who has been and still is under the care and tutelage of the mother. If there had been a reconciliation the whole of the deed would

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have fallen through; but then the boy would have ceased to be under the care of his mother, and would have come under that of the defendant. I asked in the course of the argument whether there was any case in which acts of casual and intermittent connection had been held sufficient to put an end to a deed of separation, but no such case was forthcoming. I agree that such acts are strong evidence unless explained; but it is not a necessary conclusion from them that it was intended to put an end to the deed of separation. The explanation in the present case is given by the evidence of the wife that she yielded to her husband on statements, possibly extravagant, as to his health. It seems to me to be clear that the defendant did not believe that the deed was at an end: the payments he made and certain statements in his diary shew this. On the whole, taking all the circumstances into account but not without hesitation, I have come to the conclusion that the onus which is on the defendant of shewing that the deed is no longer of any effect has not been discharged, and that the judgment should be affirmed.

A. L. SMITH L.J. I am of the same opinion. This is an action by a wife against her husband on a separation deed, and his answer is that his covenant was to pay a certain amount per week while they lived separate, but that they have come together again, and the deed and the covenant no longer have any validity. I agree that the proof of intercourse between the parties if unexplained is strong evidence to shew that they had come together, so as to put an end to the deed; but it is going too far to say, as the defendant's counsel was driven to say, that one act of intercourse, no matter what the surrounding circumstances were, would necessarily put an end to the deed. No case has gone that length. They have gone to the length of saying that if there is reconciliation the covenant to pay money to the wife comes to an end. In this case has there been reconciliation? It is plain on the uncontradicted evidence of the wife that there has been no reconciliation in the full sense of that term, and that neither party intended that there should be. The wife states that in her

evidence, and the acts of the husband confirm her statement. Considering the circumstances under which the acts of intercourse were brought about, the fact that they took place does displace this evidence. I will only add that I think that the deed is a deed of separation and nothing else.

VAUGHAN WILLIAMS L.J. I agree. A deed of separation like any other deed is subject to this—that it must be construed by what is found within the four corners of it; and for my part I would add that it is unsafe to say that this or that event will necessarily bring about the determination of the deed. This cannot be said as a general proposition, and in each case the deed must be looked at. Here the covenant is to last during the joint lives of husband and wife, if the two should so long live separate. One has to find out what the parties meant by this expression, and, notwithstanding the acts of marital intercourse which have been proved, the husband and wife have in fact continued to live separate from one another in the ordinary sense of those words. If so, the covenants of the deed are still in force, and the judgment appealed from was right.

Appeal dismissed.

Solicitors for plaintiff: *Nunn & Popham.*
Solicitor for defendant: *F. C. T. Mortimer.*

A. M.

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1899
Nov. 2.

[IN THE COURT OF APPEAL.]

THOMAS *v.* THE CORPORATION OF DEVONPORT.

Local Government—Local Authority—Municipal Corporation—Urban Authority—Audit of Accounts—Extent of Duty of Auditor—Elective Auditor of Corporation—Remuneration—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 246—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 25.

The duty of an auditor of an urban sanitary authority in auditing the accounts of the authority is not confined to ascertaining whether there are vouchers for each item of the accounts submitted to him, but extends to investigating whether the payments represented by the vouchers are authorized, or are without authority, or otherwise illegal or improper.

Elective auditors of a municipal borough are not entitled to remuneration for their services.

APPEAL from a judgment of Phillimore J. at the trial of the action without a jury.

The plaintiff was an elective auditor of the borough of Devonport, and since the defendants were the urban sanitary authority the plaintiff was, by virtue of s. 246 of the Public Health Act, 1875, also auditor of the accounts of receipts and expenditure of the defendants under that Act. He sued to recover a sum of money for auditing the half-yearly accounts of the treasurer of the borough on several occasions; and the defendants denied their liability to pay him anything for these services. He also sued to recover a further sum as remuneration for auditing the half-yearly accounts of the corporation as urban authority. The only part of this claim which it is material to this case to notice was made up as follows: For auditing the accounts for the half-year ending March 25, 1894, a claim was made for twenty days in which he was engaged on the accounts, and for the half-year ending September 29, 1894, the claim was in respect of twenty-one days. For the year 1896 the charges were in respect of twenty-three and seventeen and a half days for the two half-yearly audits. The claim was

made upon the basis of charging two guineas a day, the minimum sanctioned by s. 246 of the Public Health Act, 1875. There were in addition some charges for a clerk and for certain small expenses said to have been necessarily incident to the audit. With regard to the charges for auditing the accounts of the defendants as urban authority they paid into court the sum of 34*l.*

With regard to the claim for auditing the corporation accounts the learned judge held that the plaintiff was not entitled to any remuneration. With regard to the claim for auditing the accounts of the urban authority the learned judge came to the conclusion that an average of four days for each half-yearly audit was sufficient, and that the defendants had paid enough into court to cover the claim in this respect. He pointed out that the accounts were in substance the accounts of the receipts and expenditure of the treasurer, and expressed his opinion that the audit, in cases where an urban authority are the council of a borough, is governed by s. 246 of the Public Health Act, 1875, and s. 247 did not apply. The learned judge added: "It is, to my mind, clear that if the treasurer, having nothing on the face of the bill to teach him otherwise, honoured a draft of three members of the town council, it would be impossible to go behind that and surcharge him because the three members of the town council had in fact been careless in certifying the amount of the bill. I agree that it leaves these accounts in an unsatisfactory condition. The audit is a strictly limited one, and is not an audit of the doings of the various committees, but simply an audit of the accounts of their borough treasurer as an accounting officer. I agree that the borough treasurer cannot shut his eyes, and that if on the face of the bill it were obvious that it was not a bill which could by any possibility be passed by the corporation, as, for example, a bill for a sum of money to some unpaid member, or a bill to pay the expenses of some neighbouring town, the borough treasurer could not shelter himself behind the three signatures. To that extent the auditor would be right to open the bill and go through it; but the other two auditors tell me that, doing this, they could do the audit in four days; and it is obvious that the

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plaintiff's view of an audit must have been very different indeed from that. On the whole, I am of opinion that this matter could, on each occasion, have been properly done in four days, and that the sum paid into court is sufficient."

Judgment was entered for the defendants.

The plaintiff appealed.

Macaskie, for the plaintiff. An elective auditor of a borough is entitled to be paid for his services in auditing the municipal accounts of the corporation. Sect. 25, sub-s. 1, of the Municipal Corporations Act, 1882, provides for their borough auditors, two to be elected by the burgesses, called elective auditors, and one to be appointed by the mayor, called mayor's auditor. Sect. 26 provides that the treasurer of the borough shall make up his accounts half-yearly; and by s. 27 the treasurer shall, within one month from the date to which he is required to make up his accounts in each half-year, submit them with the necessary vouchers and papers to the borough auditors, who are to audit them. The Act does not provide in express terms for any remuneration to be paid to the elective auditors, but it nowhere prohibits payment. Sect. 139 creates the borough fund; and s. 140 enacts that the borough fund shall be applicable to and charged with the several payments specified in Sched. V.; and by sub-s. 3 no other payment shall be made out of the borough fund, except as therein provided. Sched. V. does not mention an elective auditor, and therefore there is no express provision for his payment. But by s. 246 of the Public Health Act, 1875, where an urban sanitary authority are the council of a borough, the accounts of the receipts and expenditure of the urban authority under that Act are to be audited by the borough auditors, and the auditors shall proceed in the audit after like notice and in like manner, and shall have like powers and perform like duties, as in the case of auditing the municipal accounts; and each borough auditor is to be paid for each audit such reasonable remuneration, not being less than two guineas for each day of the audit, as the urban authority may appoint. By s. 6 the council of a borough is constituted the urban sanitary authority, except in certain boroughs, of

which Devonport is not one. Therefore an elective auditor of a borough (1) is entitled to be paid for his services in auditing the accounts of the council in their capacity as urban sanitary authority. Sect. 246 places the auditing of these accounts on the same footing as the auditing of the municipal accounts, and that shews that the Legislature intended the auditors to be paid for their services in auditing both classes of accounts. This view is strengthened by the provisions of s. 12, sub-s. 1 (*a*), of the Municipal Corporations Act, 1882, which seems to treat an elective auditor as on the same footing with a person holding an office of profit. The learned judge was, therefore, wrong in holding that an elective auditor was not entitled to be paid for auditing the municipal accounts.

Secondly, an auditor under s. 246 of the Public Health Act, 1875, in auditing the accounts of the corporation as sanitary authority, is bound to do more than satisfy himself that there are vouchers for each payment. Sect. 247, which applies where the urban authority are not the council of a borough, shews, by sub-ss. 5 and 6, how thorough the audit must be. Sub-s. 5 applies to "any audit under this Act," and, therefore, to an audit under s. 246. Even if it did not apply in terms, it would shew the class of audit with which the Legislature was dealing. Under s. 246, "the accounts of the receipts and expenditure under this Act" are to be audited, and this must mean that the legality of the items is to be inquired into, otherwise there might just as well be no audit. The learned judge did not take this view, and, if he was right, four days in each half-year might have been sufficient for such a limited audit as he thought was necessary. If the audit is not limited to the mere examination of vouchers, it is clear that the plaintiff is entitled to recover more than the amount paid into Court, as that amount was arrived at on a wrong estimate of the auditor's duties.

Duke, *Q.C.*, and *J. A. Hawke*, for the defendants, were not called on.

(1) At the time of the passing of the Public Health Act, 1875, elective auditors of a borough were appointed under s. 37 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76).

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LORD RUSSELL of KILLOWEN C.J. This is an appeal from the judgment of Phillimore J. The action was tried by him without a jury, and the claim of the plaintiff is two-fold: he claimed against the corporation of Devonport for what he said was his proper remuneration in regard to work which he did in his character of elective auditor of the corporation, and he also claimed remuneration as auditor of the urban sanitary authority. This is one of those cases in which the corporation is also the urban sanitary authority.

The case really would not bear argument, it seems to me, on the part of the plaintiff, if it were not for some observations which the learned judge made in giving his judgment. To begin with, as regards the claim in respect of the auditing of the corporation accounts, it is quite clear that there was no shadow of ground for saying that the plaintiff had any legal claim. The receipts of the corporation of all kinds are paid into and form the borough fund; and payments of all kinds by the corporation, legally made, must be paid out of that borough fund, and Parliament has in clear and distinct terms laid down the appropriations which may be made out of that borough fund in the statute regulating it. If this gentleman had been the servant of the corporation there was ample power in the corporation to pay him out of the borough fund in respect of any services which he rendered; but he was not a servant of the corporation. He was elected by the burgesses of the borough under statutory powers given to them. Therefore, there is no claim at all against the corporation in respect of his services as elective auditor.

As regards the plaintiff's services as auditor of the urban sanitary authority, he was entitled to remuneration at the rate of not less than two guineas a day in respect of the days properly occupied in the work. If the matter had rested there, and the learned judge, having heard the witnesses, had come (as he did in fact) simply to the conclusion that four days in each half-year were ample for the work the plaintiff had to do in auditing the accounts, it would not be for the Court to review that conclusion. But language was used which, in my view, suggests too narrow a judgment of what the proper duties of

the elective auditor are. I do not subscribe to the doctrine that his sole duty is to see whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority.

But, granting all that, one must bear in mind what the nature of the proceedings of these local bodies is, and above all the publicity that from day to day, or week to week, or month to month, attends those proceedings; and, granting it would be the duty of the auditor to audit the accounts in a sense wider than the language of the learned judge points to, I see no reason for supposing that eight days in the year would not be ample for that purpose.

For these reasons I think the judgment must not be disturbed.

A. L. SMITH L.J. I am of the same opinion.

VAUGHAN WILLIAMS L.J. I also concur.

Appeal dismissed.

Solicitor for plaintiff: *William Lenn Walter.*

Solicitors for defendants: *Cunliffes & Davenport, for A. B. Pilling, Devonport.*

A. M.

C. A.
1899
Nov. 3.

[IN THE COURT OF APPEAL.]

CORNFORD *v.* CARLTON BANK, LIMITED.

Malicious Prosecution—Action against Corporation—Liability.

Conceded at the bar that an action for malicious prosecution will lie against a corporation.

APPEAL from judgment of Darling J. for the plaintiff in an action for malicious prosecution. (1)

McCall, Q.C., and *P. Rose Innes*, for the defendants.

Marshall Hall, Q.C., and *T. M. Stevens*, for the plaintiff.

Upon the hearing of the appeal the counsel for the defendants abandoned the contention, which had been made in the Court below, that an action for a malicious prosecution cannot lie against a corporation, but contended that upon the evidence at the trial there was no proof of absence of reasonable and probable cause for the prosecution, or of malice on the part of officials of the company within the scope of whose authority it was to institute the prosecution.

THE COURT OF APPEAL (Lord Russell of Killowen C.J., A. L. Smith L.J. and Vaughan Williams L.J.) held that upon the evidence the judge was right in finding absence of reasonable and probable cause and malice. They therefore dismissed the appeal.

Appeal dismissed.

Solicitor for plaintiff: *C. H. Waugh, for H. G. Phillips, Hastings.*

Solicitor for defendants: *S. J. Debenham.*

(1) [1899] 1 Q. B. 392.

E. L.

WRIDE, Appellant *v.* DYER, Respondent.

1899
Nov. 7.

Landlord and Tenant—Notice to Quit—Yearly Tenancy—"End of the Current Year."

A tenant held premises on a yearly tenancy from Lady Day to Lady Day. On March 24, 1898, her landlord gave her notice to quit and deliver up the premises "on June 24, 1898, or at the end of your current year's tenancy":—

Held, that the notice must be construed in accordance with the intention of the landlord, and that since it was impossible to suppose that it was intended to be a notice to quit on March 25, 1898, when the current year's tenancy expired, it must be taken to be a good notice to quit the premises on March 25, 1899.

Doe v. *Culliford*, (1824) 4 D. & R. 248, followed.

Doe v. *Morphett*, (1845) 7 Q. B. 577, dissented from.

Special Case stated by justices under the Summary Jurisdiction Acts.

On May 5, 1899, an application by the respondent to recover certain premises known as No. 4, Holland Street, Ashcombe, Weston-super-Mare, from the appellant under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), was heard by the justices, and the following facts were proved or admitted at the hearing.

The respondent was the owner of the said premises, and the same were, at the date of the notice to quit hereinafter mentioned, held by the appellant as tenant to him upon a yearly tenancy from Lady Day to Lady Day at a rent not exceeding 20*l.* per annum, no fine being reserved or made payable thereon. The contract of tenancy under which the premises were held was verbal, and there was no special stipulation, nor agreement, nor any custom as to the time or mode of determining the tenancy.

On March 24, 1898, a notice to quit the premises was served on the appellant by or on behalf of the respondent in the following terms:—

"To Mrs. Emily Wride.

"I hereby give you notice to quit and deliver up to me all

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that cottage, garden, and premises which you hold or rent of me situate at and known as No. 4 Holland Street, Ashcombe, Weston-super-Mare, on the 24th of June, 1898, or at the end of your current year's tenancy.

"Dated this 24th day of March, 1898.

"William Dyer."

The appellant did not quit and deliver up the premises, but at the date of the application was still in occupation of them. It was contended on her behalf that the notice above set out was either a three months' notice to quit on June 24, 1898, which was not the end of a year of the tenancy, or a one day's notice to quit on March 25, 1898, which day was the end of the current year's tenancy, and that the notice was, therefore, bad. It was admitted on behalf of the respondent that the notice was not a legal notice to quit on June 24, 1898, but it was contended that it was a legal notice to quit on March 25, 1899, and that the tenancy of the appellant was accordingly determined on that date.

The justices held the notice to be a legal notice to quit on March 25, 1899, but stated this case for the opinion of the Court.

Brooke Little, for the appellant. The notice to quit was bad. It was a notice to give up possession either at Midsummer, 1898, or at the expiration of the current year—that is to say, on the next morning, March 25, 1898. It is true that a very similar notice was held good in *Doe* v. *Culliford* (1); but that case has been said to be bad law in *Doe* v. *Morphett* (2), and in Cole on Ejectment, p. 52, it is said that the case is of no authority, having been expressly overruled by *Doe* v. *Morphett*. (2)

[DARLING J. referred to *Doe* v. *Smith*. (3)]

That case was considered in *Doe* v. *Morphett* (2), and it can be explained on the principle that where a notice is ambiguous or inconsistent, the Court may read in words to make it sensible and rational. Where, however, there is no ambiguity,

(1) 4 D. & R. 248. (2) 7 Q. B. 577.

(3) (1836) 5 A. & E. 350.

but the terms of the notice are quite clear in themselves, as was the case here, the Court cannot make it a good notice by putting a strained interpretation upon it.

Layman (*Weatherly* with him), for the respondent, was not called upon to argue.

RIDLEY J. In this case I should say very little if it were not for the cases which have been cited to us. The facts are simple. A landlord, on March 24, 1898, gives to his tenant, who holds on a yearly tenancy from Lady Day to Lady Day, a notice in the following terms: "I hereby give you notice to quit and deliver up to me all that cottage, &c., on the twenty-fourth of June, 1898, or at the end of your current year's tenancy." The question is whether that was a good notice. If it was a notice to quit on March 25, 1899, it was good; if, on the other hand, the words "current year" are to be interpreted strictly, it was a notice to quit the next day—that is to say, on March 25, 1898, and, if so, it would be a bad notice. It seems to me that each case must be taken by itself, and that one decision on the meaning of a notice to quit does not afford much guidance for the interpretation of a notice in different words. I agree, however, with the rule laid down by Bayley J. in *Doe* v. *Culliford* (1) that we must look at the intention of the landlord, and that when language is used which leaves the effect of the notice open to doubt, the rule of construction is to make it sensible and not insensible. In *Doe* v. *Morphett* (2), however, *Doe* v. *Culliford* (1) was treated as bad law, and the principles of construction laid down in the judgment of Bayley J. were said to be incorrect. I cannot agree with that. As it seems to me, the judgment of Bayley J. in *Doe* v. *Culliford* (1) was quite right, and I can find nothing in the principles of interpretation he there laid down which is contrary to the general law. I think that he states most precisely the principles which ought to guide the Court in construing such documents, and in my opinion those are the principles on which we ought to decide this case. We must remember that we are dealing with sensible people, and we must try to

(1) 4 D. & R. 248.

(2) 7 Q. B. 577.

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Ridley J.

interpret the notice as if it were given by a man of sense. No one could imagine that the landlord intended to give the tenant notice to quit the premises the next day. It would be absurd to read the notice as giving notice to quit in three months' time or the next day. Such a notice would be unreasonable and impossible, and would be, as was said in *Doe* v. *Culliford* (1), no notice whatever. In *Doe* v. *Morphett* (2) the time at which the current year would expire was much further off, and that may distinguish that case from *Doe* v. *Culliford.* (1) No one could imagine that a landlord intended to give the tenant two days' notice to quit as in *Doe* v. *Culliford* (1), or one day's notice as here, but possibly a notice given on October 21 to terminate a tenancy from Martinmas to Martinmas at the expiration of the current year might be held, as it was in *Doe* v. *Morphett* (2), to be intended to be a notice to go out at the very next Martinmas, and therefore bad. Here, however, I think there is no ambiguity. It could not have been intended by the landlord, or understood by the tenant, that the words "current year" applied to the few hours of that year which had still to run. I think, therefore, that we are justified in reading the notice as a good notice to quit on March 25, 1899.

DARLING J. I am of the same opinion. We are asked in this case to read the notice as meaning that it was a notice to the tenant to quit and deliver up possession of the premises either in three months' time or the next morning. And no doubt, if the language of the notice is to be construed strictly, that is what it says. But what is the rule of construction of such documents as this? It is laid down, I think, by Bayley J. in *Doe* v. *Culliford* (1), and it was well expressed by Sir John Jervis in arguing the case of *Doe* v. *Smith.* (3) "The Court," he says, "will give an interpretation to the notice consistent with the intention of the party serving it, if clear." *Doe* v. *Culliford* (1) was cited to the Court in that case, and no doubt whatever was then thrown by the Court (which consisted of Lord Denman C.J., Littledale, Patteson, and Williams JJ.) on the

(1) 4 D. & R. 248. (2) 7 Q. B. 577.
(3) 5 A. & E. 350.

principles laid down in the earlier case by Bayley J. They decided the case in accordance with Sir John Jervis' contention, Littledale J. saying of the notice: "This is certainly a lame and inaccurate notice, but such as it is we must endeavour to give it a rational interpretation." Now, applying that to the present case, I ask whether such an interpretation as we are asked to put upon this notice would be rational? In my opinion, it would be in the highest degree irrational. But it is said that the principles laid down in *Doe* v. *Culliford* (1), and acted upon in *Doe* v. *Smith* (2), have been overruled by *Doe* v. *Morphett*. (3) In my opinion those two earlier cases were right, and entitle us to uphold this notice. As I have already pointed out, *Doe* v. *Culliford* (1) was cited to the Court in *Doe* v. *Smith* (2), and the Court in giving their decision expressed no dissent from it. It was not till nine years later that, in *Doe* v. *Morphett* (3), a Court consisting of Denman C.J., Patteson, Williams, and Coleridge JJ. said that they could not agree with Bayley J. in *Doe* v. *Culliford* (1), and that they thought that case was bad law. I do not agree in that view, and I think we have ample authority for holding that this notice was good, or, to use the classic expression of Denman C.J. in *Doe* v. *Smith* (2), that it was "well enough."

Appeal dismissed.

Solicitors for appellant: *Gilmore, Mawer & Lloyd, Bristol.*

Solicitors for respondent: *Meredith, Roberts & Mills, for Baker, Son, James & Lillington, Weston-super-Mare.*

(1) 4 D. & R. 248. (2) 5 A. & E. 350.
(3) 7 Q. B. 577.

A. P. P. K.

C. A.
1899
Nov. 7, 22.

[IN THE COURT OF APPEAL.]

WEIR & CO. *v.* UNION STEAMSHIP COMPANY, LIMITED.

Ship—Charterparty—Obligation of Shipowners to Supply Ballast.

By a charterparty, which did not involve a demise or parting with possession of the ship by the shipowners, she was, in consideration of a certain sum per month, to be placed at the disposal of the charterers to be employed by them in the conveyance of lawful merchandise $\frac{\text{and}}{\text{or}}$ passengers between certain ports, and it was stated that she was let for the sole use and benefit of the charterers for two or three round voyages at charterers' option commencing not later than a day specified, by which day she was to be placed with "clear holds" at the disposal of the charterers at the port of New York, they having the "whole reach or burthen" of the vessel, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores, and the vessel was not to be required to load more than she could reasonably stow and carry over and above her tackle, provisions, stores, and fuel:—

Held, by the Court of Appeal (A. L. Smith L.J., Collins L.J., and Vaughan Williams L.J., the last mentioned doubting), that the terms of the charterparty did not rebut the ordinary implication in the case of a charterparty by which the obligation of supplying any ballast that may be necessary for the safe navigation of the ship rests upon the shipowner.

APPEAL from a judgment of Bigham J. as after-mentioned.

The action was by shipowners against charterers for an alleged breach of the terms of a charterparty in not supplying cargo or its equivalent in ballast in order to put the ship in proper trim for a voyage under the charter, whereby the ship sustained damage, and also for the balance of hire of the ship due under the charterparty. The defendants counter-claimed in respect of amounts paid by them for sand ballast, which they had under protest supplied for the purpose of putting the ship in proper trim for voyages under the same charter. It was ordered that there should be a preliminary trial in the action without a jury of the question, whose duty it was under the charter to provide any ballast that might be necessary beyond water ballast for the safe sailing of the ship on the chartered voyages and at whose expense.

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By the charterparty, which was dated June 10, 1897, it was agreed between the plaintiffs, as owners of the steamship *Elleric*, and the defendants, as charterers, as follows:—

1. The said vessel being tight, staunch, and strong, and in every way fitted for the service, and to be maintained by owners with sufficient complement of officers, seamen, engineers, firemen, and stewards, shall be placed at the disposal of the said charterers or their assigns, to be employed by them in the conveyance of lawful merchandise (including live stock) and/or passengers as follows: between all good and safe ports and places in the United Kingdom and/or Continent of Europe and/or United States and/or ports of South and East Africa and/or Indian Ocean and/or Australia and/or Mediterranean and/or Black Sea, but no Black Sea between October 1 and May 1. 2. The said vessel is let for the sole use of the said charterers and for their benefit, and with liberty to sublet (subject to owners' approval of trade), for two or three round voyages at charterers' option commencing not later than the 15th day of July next, by which day she is to be placed with clear holds at the disposal of the charterers at the port of New York, they having the whole reach or burthen of the vessel, including passenger accommodation, if any, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores; and the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel. The owners guarantee the vessel has just been in dry dock and painted, and undertake to maintain her in a thoroughly efficient state during the currency of the charter. Hire is not to commence before 10th July unless charterers otherwise agree. 3. The captain shall use all and every reasonable dispatch in prosecuting the voyage or voyages. Sails are to be set whenever practicable and of advantage to charterers, and the crew are to render all customary assistance in loading and discharging, which however is to be carried out by and at the risk and expense of the charterers, they employing the necessary stevedores for the purpose, but owners are to provide all necessary gear and men to work the steam-winches in ports of loading and discharge. Crew's overtime, if any, to

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be paid by charterers. 4. The captain, although appointed by owners, shall be under the orders and directions of the charterers as regards employment, agency, and other arrangements, and the charterers hereby agree to indemnify the owners against all consequences or liabilities that may arise from the captain's signing bills of lading or in otherwise complying with such orders and directions. 5. If the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments. 6. The captain shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which is to be patent to charterers or their agents. The captain shall also see that his officers keep proper cargo tallies. 7. The coals for the steam-engines shall be supplied by and at the cost of the charterers, who shall also bear all port and dock charges, pilotage, light dues, agency commissions, delivery, labourage, and all other duties, charges, and expenses, the owners providing and paying for all ship's stores, insurance, crew's wages, and victualling, and necessary stores for the engine-room, and all stores, bedding, crockery, mess utensils, and other requirements for passengers, charterers to pay 5*s.* per day for victualling any passengers carried first class, 2*s.* 6*d.* per day for second class, and 1*s.* 6*d.* per day for third class, and to provide any fittings required for second and third class passengers beyond those on board, always provided there is room for the passengers. 8. The freight for the hire of the said vessel shall be paid as follows, at and after the rate of 1050*l.* per month and to be paid monthly in cash in advance in London, and to continue payable notwithstanding expiration of time specified for terminating the charter, until the vessel is again returned by the charterers to the owners at New York, and to be delivered in like good condition as when chartered, fair wear and tear excepted. In the event of loss of time by deficiency of men, want of stores, breakdown of engines, or machinery, or by damage causing the vessel for more than twenty-four running hours to become incapable of steaming,

less efficient, less tight, staunch, and strong, or less fitted for the service than at the date of this charterparty, payment of hire to cease until such time as she is again in an efficient state to resume the voyage. In the event of the vessel being lost payment of hire to cease from the date on which she was last heard of, and any payments or advances in respect of time subsequent thereto or during inefficiency as above to be refunded to the charterers. 9. The act of God, Queen's enemies, fire, pirates, robbers, thieves whether on board or not, barratry of master or mariners, heat, explosions, collisions, stranding and all other perils, dangers, and accidents of the seas, rivers, navigation, boilers, and machinery of whatsoever nature or kind always excepted. 10. The owners to have a lien upon the cargo and freight for arrears of hire, including the monthly freight in advance, and the charterers to have a lien upon the ship for such last-mentioned freight. 11. The vessel has liberty to tow or be towed and otherwise assist vessels in distress without prejudice to this charterparty. 12. All derelicts and salvages for owners' and charterers' equal benefit. General average payable according to York-Antwerp Rules, 1890. 13. In default of payment of hire, when due, owners to be at liberty immediately to resume possession of the vessel and to claim damages. 14. The commission is 5 per cent. on the gross amount of freight, payable by instalments on receipt of each month's hire, and is due to F. Fillett (the shipowners' agent), one-half of which is to be returned to charterers. 15. Coal in the bunkers at commencement and end of charter to be taken over by charterers and owners respectively at market prices. 16. Charterers to have the option of cancelling this charterparty if the vessel is not placed at their disposal as and at the time stipulated above. 17. Charterers to have the option of renewing this charter on above terms at end of second voyage—that is to say, they may retain her for two or three round voyages. Owners to dry dock vessel at end of first voyage and also at the end of second voyage, if she has been away more than six months; and hire for time occupied is not to be charged against charterers. Charterers to declare as to third voyage thirty days before expiration of second voyage. 18. Owners guarantee a

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dead-weight capacity of about 5800 tons with a measurement capacity of about 7000 tons of forty cubic feet from inside of cargo battens to top of beams, in addition to bunker capacity for 360 tons coal, and the steamer's speed is 9/10 knots on a consumption of about 20/22 tons Welsh coal.

It appeared that the vessel, which had tanks for water ballast, had been placed at the disposal of the defendants the charterers, under the charterparty at New York, and had been by them loaded with a cargo for the Cape. After arrival and discharge of cargo there, she was ordered by the charterers to return to New York empty. The captain, being of opinion that it would not be safe for her to make the voyage without ballast in addition to her water ballast, requested the charterers to provide additional ballast, which they refused to do. The ship proceeded on the voyage to New York as ordered, and sustained certain damage on the voyage in respect of which the action was brought. At New York the vessel was again loaded with a cargo for the Cape. After arrival and discharge of the cargo there, she was again ordered by the charterers to return empty to New York. The captain again requested the charterers to supply ballast for the voyage in addition to the water ballast, refusing to proceed without it; and the charterers provided the requisite amount of sand ballast under protest. The same thing occurred on the third voyage under the charter. The preliminary trial took place before Bigham J., who held that the plaintiffs, the shipowners, were bound to supply the necessary ballast in addition to the water ballast.

The plaintiffs appealed.

Nov. 7. *Carver, Q.C.*, and *Leck*, for the plaintiffs. In the case of an ordinary voyage charter, the shipowner is no doubt bound to supply the necessary ballast. But the charter in this case is really in substance a time charter, and on the true construction of it the charterers must find any ballast which may be necessary in addition to the water ballast. The ship is by clause 2 to be placed at the disposal of the charterers with "clear holds," and the shipowners, therefore, have no right to interfere with the capacity of the holds. This charter is not

really a contract of carriage, but one of hire of the ship. The charterers hire the entire capacity of the ship with the exception of the requisite space for the crew, tackle, &c., and are to have the complete control of and responsibility for the loading of the space so hired: see clause 3 of the charter. It is contended that under this charter the charterers are intended to be the carriers of the cargo, not the shipowners. It should be observed that the charterers are themselves a steamship company. The whole scheme of the charterparty negatives the existence of the liability to supply ballast which in the case of an ordinary charterparty rests on the shipowner. The shipowners are to keep the ship efficient for the purposes of the charter, but that means efficient as originally placed at the disposal of the charterers—namely, with clear holds. Labour is the principal expense in shipping sand ballast, and by clause 7 "labourage" falls upon the charterers. The shipowners would no doubt be bound to fill the tanks with water ballast if necessary to trim the ship, for that is part of the equipment of the ship itself, but they are not bound to supply any further ballast.

Joseph Walton, Q.C., and *Scrutton*, for the defendants. The ordinary implication, whether in the case of a voyage charter or a time charter, is that the shipowner must provide the ballast necessary to enable him safely to perform his contract of carriage. There is nothing in the terms of this charter to rebut that implication. This is not the case of an absolute demise of the ship to the charterers. It is clear on the terms of this charter that the captain and crew are to navigate the ship as the servants of the shipowners, not of the charterers. The shipowners undertake to provide and maintain the ship in an efficient state for the service contemplated by the charterparty. It is common knowledge that in the case of such a round voyage as is provided for by this charter there may be cargo from New York to the Cape and none for the return voyage. The shipowners must, therefore, provide the ballast necessary to make the ship efficient for the return voyage. The provision that the ship is to be placed at the disposal of the charterers with clear holds must be read subject to the provision

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that the ship is not to be required to load more than she can safely stow and carry; that is to say, subject to the exception of so much space as may be necessary for ballast.

[They cited *Southampton Steam Colliery Co.* v. *Clarke* (1); *Irving* v. *Clegg* (2); *Towse* v. *Henderson.* (3)]

Carver, Q.C., in reply.

Cur. adv. vult.

Nov. 22. A. L. SMITH L.J. read the following judgment:— The question in this case is whether the shipowners or the charterers are the persons to supply ballast for the shipowners' ship, and this point depends upon the terms of a charterparty, dated June 10, 1897, and made between the owners of the steamship *Elleric* (Messrs. Weir & Co.) of the one part, and the charterers (The Union Steamship Company, Limited) of the other, which charter I will particularly refer to in a moment.

On the voyage out from New York to the Cape, which was one of the voyages contemplated by the charter, the steamship was loaded with such a cargo as to render the water ballast in tanks, with which the ship was provided, sufficient; but on the voyage back from the Cape to New York, also a voyage contemplated by the charter, the ship came without cargo in her, so that ballast in addition to the water ballast had to be taken on board. This ballast consisted of sand, which was placed in the holds of the ship, and it is as to the cost and expense attending this sand ballast that the question arises, the shipowners asserting that the charterers are liable thereto. My brother Bigham has held the contrary, and that this liability falls upon the shipowners; and they appeal.

Before I go to the charterparty, I must point out that under an ordinary charter of a ship the shipowner is bound to provide the necessary ballast for his ship, the reason being that, as he is responsible for the navigation of the ship by his captain, he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage. Mr. Carver well points out in his work on "Carriage by Sea," s. 262, that not only is it

(1) (1870) L. R. 6 Ex. 53. (2) (1834) 1 Bing. N. C. 53; 41 R. R. 561.
(3) (1850) 4 Ex. 890.

the duty of the shipowner, but it is his privilege, to ballast his ship, for he is entitled to carry merchandise as ballast, bearing freight, provided it occupies no larger space than the ordinary ballast would do, and leaves to the charterer the full space of the vessel proper to be filled with his cargo. The question therefore comes to this: Does the charterparty in this case, to use my brother Bigham's phrase, relieve the shipowner of his ordinary duty?

Now what is this charterparty? It is a charterparty by which the shipowners agree that their vessel, being tight, staunch, and strong, and in every way fitted for the service, and to be maintained by owners with sufficient complement of officers, seamen, engineers, firemen, and stewards, shall be placed at the disposal of the charterers to be employed by them in the conveyance of lawful merchandise $\frac{\text{and}}{\text{or}}$ passengers between ports and places in the United Kingdom . . . . $\frac{\text{and}}{\text{or}}$ the United States $\frac{\text{and}}{\text{or}}$ South and East Africa . . . . for two or three round voyages at charterers' option, commencing not later than July 15, 1897, when she is to be placed with clear holds at the disposal of the charterers at the port of New York . . . . and it is agreed by the charterparty that . . . . the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel, and the freight to be paid by the charterers is the sum of 1050*l.* per month, to be paid monthly in cash in advance in London. By the charterparty the captain is to be appointed by the shipowners, though he is to be under the directions of the charterers; and it is agreed that the captain shall use all reasonable dispatch in prosecuting the voyage, and that the crew shall render all customary assistance, and that, if the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, after inquiry, if necessary, make a change in the appointments.

I cannot doubt that under this charterparty the ship was to be navigated by the servants of the shipowners, that the captain was the shipowners' captain, and not the captain of the charterers, and the crew were the crew of the shipowners,

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and not of the charterers, and that the whole control and management of the ship as regards navigation was left in the hands of the owners, who remained in possession of the ship by their servants, although the charterers might direct where the ship was to go and with what she was to be loaded, and were to pay the various named disbursements.

When a question arises as to whether a charterparty constitutes a demise of a ship or not, the ordinary test is, whose servants are those who are to navigate the ship. If the shipowners' servants, then they act as carriers of the cargo for the charterers; whereas, if they are the servants of the charterers, the shipowners generally cease to be carriers, and the contract is one of hiring. In the former case there is no demise of the ship; in the latter there may be. In my opinion, in the present case there is no demise of the ship, and the primâ facie rule as to the owner supplying ballast applies.

Before going to other clauses of the charter, upon which the shipowners rely, I will point out that the charterers are under no obligation to load on board the ship a full cargo or any particular cargo. They might load just what they liked—two-thirds, or a half, or a third, of a cargo, or no cargo at all. They might put on board passengers only. The sole obligation of the charterers as to loading was not to overload the ship. They might underload her as much as they liked. They contracted to pay the 1050*l.* freight per month irrespective of whether they loaded cargo or passengers or not; and in my opinion they had the right of sending the ship upon the contemplated voyages loaded or not as they thought fit. They might send the ship out from New York to the Cape empty or with only passengers on board, and the owners had no cause of complaint if they did so. Now suppose the charterers, being, as they would be, well within their rights under this charter, determined to send the ship out, say, with only passengers on board on the first half of the first round voyage from New York to the Cape, which necessitated for the safety of the navigation of the ship sand ballast in addition to the water ballast in the tanks: whose duty was it to put

the sand as well as water ballast on board at New York? The shipowners have to admit that they, by their captain, had to put the water ballast on board. And why, I ask, are they not also bound to put the sand ballast on board, if such was necessary for the stability and due navigation of the ship? Unless there are clauses in the charter shewing that the shipowners are exempt from this obligation, the charter not constituting a demise of the ship, the shipowners are clearly liable thereto. Similar circumstances existing at the Cape as to the return voyage to New York, I am of opinion that the duty of the shipowners by their captain is to do the same as regards sand and water ballast at the Cape as at New York; and there is nothing in the charterparty, so far as I have cited it, to shew that the owners are relieved from this ordinary liability.

But it is said on behalf of the shipowners that this is not so, for the charterparty in some of its clauses shews that the owners are relieved from this obligation: firstly, it is said, because by the charterparty the shipowners are to tender their ship at New York to the charterers with clear holds, and that, if ballast other than water ballast was to be used by the shipowners, this could not be done, for ballast, other than water ballast, would have to be put in the holds, and, as they had to tender the ship with clear holds, the shipowners were not to put ballast other than water ballast on board; in other words, that this clause shews that the charterers were bound to put such cargo on board as would cause the ship to stand up with water ballast alone, or, if not, that the charterers were to put in the other ballast themselves to make her stand up. The answer to this argument is that the charterers are only to have clear holds to stow what the ship can reasonably stow over and above her tackle, provisions, stores, and fuel. If a light cargo is put on board, which the charterers are clearly entitled to put on, so as to necessitate ballast in addition to water ballast, it is obvious that that ballast must be put on by some one; and where in this clause is there anything to say that this must be put on by the charterers and not by the shipowners? The truth is, if the charterers put on board the cargo they are

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entitled to under the charter, and it is so light that the ship will not stand up without further ballast, as it is the duty of the shipowners by their captain to properly navigate the ship, so they must by their captain put on board the necessary ballast. It was next said that clause 3 exempted the shipowners from putting in the sand ballast. I do not agree. This clause relates to loading and discharging cargo. It has nothing to do with ballast. Clause 4, which relates to indemnity, in my opinion is wholly foreign to the question of ballast, and it should be pointed out that this clause does not, as it appears to me, extend to the improper navigation of the ship. The word "labourage" in clause 7, which is relied on by the shipowners, in my opinion has no reference to ballast. In my judgment, if a shipowner is to be relieved from the obligation of ballasting his ship, the charterparty not constituting a demise of the ship, there must be in the charterparty a clause to that effect, and I can find nothing like such a clause in the charterparty in this case.

For the reasons above, I think my brother Bigham was quite right, and that this appeal must be dismissed.

COLLINS L.J. I am of the same opinion. It was suggested by the counsel for the shipowners that this case raised a great question of principle, but it does not appear to me to do so. It seems to me to depend on the special terms of the bargain made between the parties. It is clear law and is admitted on all hands that in the case of ordinary charterparties the obligation to provide ballast lies on the owner of the ship. It was said however by the counsel for the shipowners that the rule applicable to time charters in this respect differs from that which applies to voyage charters. That does not appear to me to be so, unless the charter is not a contract of carriage, but one for the hire of the ship, amounting to a complete demise of her which relieves the shipowner and his captain from the duty of managing the ship and places it on the hirer. For the reasons given by my brother A. L. Smith L.J., I am of opinion that the charterparty in this case did not amount to a complete demise of the ship such as I have mentioned, and that the

master of the ship remained the agent of the shipowners in all matters relating to the navigation of the ship, and consequently primâ facie was as such agent bound to fulfil the ordinary liabilities of the shipowners. We start, therefore, with the presumption that the ordinary obligation with regard to the ballasting of the ship rested upon the shipowners. There may of course be special clauses in the charterparty which shift this burden on to the charterers. The counsel for the shipowners say there are such clauses in this charter. I think however that, when this charterparty is examined, it is clear that there is nothing to rebut the presumption with which we started, but on the contrary there are clauses which appear to contemplate that the obligation to provide the necessary ballast shall rest upon the shipowners. The counsel for the charterers relied upon one clause in particular, which I think supports their contention: namely, the clause which provides that the ship shall not be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel. The counsel for the charterers put by way of illustration the case of the charterers seeking to load the ship with a cargo too light to bring her down to the necessary depth for safe navigation; and they relied on the decision in *Towse* v. *Henderson* (1) as shewing that in such a case it would be the right of the shipowners to insist on room being found for such ballast as might be necessary to weigh the ship down to the proper depth, in order to enable them safely to perform their obligation to carry the cargo. Clause 2 of the charterparty was, on the other hand, chiefly relied on by the counsel for the shipowners as taking the case out of the ordinary presumption with regard to the obligation to supply ballast. That clause provides that by the 15th day of July the ship shall be placed with clear holds at the disposal of the charterers at the port of New York, they having the whole reach or burthen of the vessel, including passenger accommodation, if any, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores. It is said that that is an absolute contract to place the whole reach

(1) 4 Ex. 890.

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or burthen of the ship with the exception mentioned at the disposal of the charterers, and negatives the right of the shipowners to take up any part of that space with ballast. I do not think that this view can be sustained having regard to the construction that has been put on provisions which, though not identical, are very similar in the case of *Towse* v. *Henderson* (1), to which I have already referred. There the contract was to load a full and complete cargo, and, the shipowner having put cargo by way of ballast in his ship, the charterers refused to load her, and the shipowner in consequence brought an action against them. A verdict having been given for the plaintiff, a rule nisi was obtained for a new trial. One point taken for the defendants was that the full capacity of the ship had not been placed at their disposal. The Court disposed of this point on the argument of the rule and took time to consider another point which is not material to this case. In giving judgment afterwards they said: "The Court have already disposed of another objection, namely, that the plaintiff had no right to ship a part of the cargo as ballast, for that the defendants were entitled to the full capacity of the ship, exclusive of all other merchandise, for the purpose of storing tea. The Court has said that the owner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, leaving to the charterer the full space of the vessel proper to be filled with tea." Therefore the Court, accepting the contention that the charterers were entitled to the full capacity of the ship, which I think is in effect the same thing as the "whole reach or burthen of the vessel," nevertheless held that this was subject to the right of the shipowner to take on board merchandise as ballast. Similarly I think that in the present charter the stipulation that the charterers are to have the whole reach or burthen of the vessel must be read as subject to an exception of so much space as may be required for the purpose of the ballast necessary for the safe navigation of the ship. Therefore I agree, both in the result and in the reasons given, with the judgment already delivered by my brother A. L. Smith L.J.

(1) 4 Ex. 890.

VAUGHAN WILLIAMS L.J. This case turns upon the construction of a charterparty, the question raised being whether or not according to its true construction the shipowners were bound to supply ballast for the ship, that is to say, ballast in addition to the water ballast. The case is to my mind one of some difficulty; and there appears to me to be much to be said on both sides. I am not sure, if I had had to decide this case by myself, that I should have arrived at the same conclusion as the other members of the Court, but I am not disposed to differ from them and from Bigham J. on the doubtful construction of a private document.

The first question which arises, and on which I desire to say a few words, is whether according to the true construction of this charterparty it amounts to a demise of the ship by the shipowners to the charterers; that is to say, whether it involves a parting with the possession of her to the charterers. The cases run very fine on this subject. A very important authority on the question whether there is a demise of the ship is the case of *Colvin* v. *Newberry* (1) in the House of Lords. There is a passage in Lord Tenterden's judgment in that case which contains a concise statement of two possible views of a charterparty. He said (2): "Two propositions of law are clear as applicable to a case like this: the first is that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship: the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner pro tempore during the voyage for which the ship is

(1) (1832) 1 Cl. & F. 283; 33 R. R. 437, 454.

(2) 1 Cl. & F. p. 297; 33 R. R. 455.

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chartered." That passage plainly shews that Lord Tenterden did not consider that the mere fact that the absolute owners are to provide the master and crew, provisions, tackle, &c., conclusively proves that there is no demise of or parting with possession of the ship by the shipowners. In another case (1), in dealing with this question, the illustration was taken of the letting of a wagon and horses where the person letting them insists on providing the wagoner who is to have charge of them. In that case again it was held that the question who is to have the appointment of the master and crew is not conclusive of the matter. As I do not propose to differ from my brothers on the question whether there was in this case a demise of the ship, I should not be justified in reading at length the various clauses in the charterparty which to my mind tend to shew that there was an intention on the part of the shipowners to part with possession of the ship to the charterers. I may say generally that, when the bill of lading clause is looked at, there is a good deal to shew that it was intended that the charterers should be the carriers of any cargo which might be put on board the ship. It is also a remarkable thing that in this charter power is given to the charterers to sublet the ship itself. Again, the provisions with reference to lien and the language of clause 8 which speaks of returning the vessel to the shipowners at the expiration of the time specified for terminating the charter are likewise matters which seem to me to go a considerable way towards shewing that it is at any rate a very arguable point that this charter amounted to a demise of the ship. On the other hand, I have looked at all the cases, and it seems to me that the general tide of authority since *Colvin* v. *Newberry* (2) has certainly set very much against construing charters as amounting to a demise of the ship by the shipowners to the charterers.

But a further question arises. Assuming that the proper conclusion is that there was in this case no demise or parting with possession of the ship by the shipowners, and that, as

(1) Apparently the case of *Master of Trinity House* v. *Clark*, (1815) 4 M. & S. 288, is referred to.

(2) 1 Cl. & F. 283; 33 R. R. 437, 454.

was the case in *Omoa and Cleland Coal and Iron Co.* v. *Huntley* (1), the master and crew were the servants of the shipowners and not of the charterers for the purpose of navigating the ship, it does not appear to me that the fact that the shipowners remained in control of the navigation of the ship is conclusive to shew that they were, upon the true construction of the charterparty, bound to provide any ballast that might be necessary beyond the water-tank ballast. That would depend, as it appears to me, upon what is the true effect of the clause in the charterparty which says that the shipowners are to place the ship at New York at the disposal of the charterers with clear holds, they having the whole reach or burthen of the vessel, including passenger accommodation, if any, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores. The case of *Towse* v. *Henderson* (2) appears to shew that the obligation of the shipowner to put ballast on board the ship is co-extensive with his privilege to furnish the ballast in the shape of cargo to be carried for his benefit. Now, would the shipowners according to the true construction of this charter have had a right at New York, if they chose to do so, to place the ship at the disposal of the charterers with sand or sufficiently heavy cargo in lieu thereof to be carried for their own benefit as ballast? If, according to the true construction of the charter, the shipowners had no right to tender the ship to the charterers with sand ballast on board or cargo instead thereof, it seems to me difficult to come to the conclusion that they were bound to provide sand ballast at New York or elsewhere at their own expense. The other members of the Court have come to the conclusion that this provision of the charter does not relieve the shipowners from the obligation to provide ballast which no doubt primâ facie would rest upon them as retaining control of the navigation of the vessel, and, as I have already said, I am not disposed to differ from the rest of the Court with regard to the conclusion to be drawn upon a balance of considerations arising on the construction of a charter of so involved a character as this. I have, however,

(1) (1877) 2 C. P. D. 464.

(2) 4 Ex. 890.

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thought it right to call attention to the matters I have mentioned to shew that I have not overlooked them. One word as to the distinction between water ballast and sand ballast. I think there is this great distinction between the two. The obligation to supply the water ballast is really an obligation to supply that which, by reason of the construction of the ship, is necessary. There is no real distinction, as it seems to me, between putting water into a tank built into the ship as part of it, for the purpose of trimming the ship, and putting a mast into a place provided for the reception of a mast. Though the water does operate as ballast, I think it is fallacious to treat the obligation to fill the water tanks with water as analogous to or on the same basis as the obligation to put sand or cargo into the hold for the purpose of trimming the ship. The obligation to supply ballast such as sand or goods depends not on the construction of the ship, but on the weight of the cargo which is carried by the shipowner or the charterer, as the case may be, according as the one or the other is on the true construction of the charterparty the carrier.

Appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Bircham & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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WEIR & CO. *v.* GIRVIN & CO.

Ship—Charterparty—Advance Freight—Payment Three Days after Sailing—Destruction of Part of Cargo before Sailing by Excepted Peril.

By a contract of charterparty the defendants contracted to load on board the plaintiffs' ship a full and complete cargo at a certain rate of freight per ton "on the quantity to be delivered to the consignees." "The freight to be due and paid as follows: Two-thirds in cash three days after sailing, ship lost or not lost, the balance on unloading and right delivery of the cargo." After the defendants had loaded a part of the cargo a fire broke out on board and destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charterparty. The defendants subsequently loaded the balance of the cargo, and the ship sailed. Three days after sailing the plaintiffs claimed payment of advance freight on two-thirds of the full cargo shipped:—

Held, that the plaintiffs were not entitled to payment of advance freight on the part of the cargo destroyed.

Judgment of Lord Russell of Killowen C.J., [1899] 1 Q. B. 193, affirmed.

Appeal from a judgment of Lord Russell of Killowen C.J. at the trial of the action without a jury, reported [1899] 1 Q. B. 193.

By a charterparty dated March 31, 1898, made between the plaintiffs, owners of the ship *Olivebank*, and the defendants (as London agents of Messrs. Girvin & Eyre, of San Francisco, the charterers), it was agreed that the charterers should load in the river Tyne or Tyne Dock a full and complete cargo of lawful merchandise, except certain specified kinds, "the cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause)," and that the ship should proceed therewith to San Francisco. The clause as to freight was as follows: "Freight for the said cargo to be paid on final discharge at the rate of 16*s*., except on cargo shipped in Hull as hereinafter provided, per ton of 2240 lbs., on the quantity to be delivered to the consignees. The freight to be due and paid as follows: Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the said cargo

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. . . . The act of God . . . . fire . . . . mutually excepted." The side clause was as follows: "Charterers undertake to ship, and owners to load, 1000 tons of dead-weight cargo . . . . in manner required by master in Hull . . . . Freight on cargo shipped at Hull being paid at 14*s.* per ton. In event of charterers not loading vessel to her marks, it is agreed that freight shall be paid on the basis of 4350 tons, which owners hereby guarantee to be the vessel's capacity of cargo for the voyage, less pro ratâ freight on any quantity of cargo short delivered in San Francisco."

The charterers loaded 1017 tons of cargo on board the ship at Hull. She then proceeded to the Tyne, where 461 more tons were loaded. When the loading had proceeded thus far, a fire broke out on board the ship, with the result that of the 1478 tons so loaded part was destroyed, and the rest so damaged that it had to be removed from the ship. The charterers subsequently loaded on board 2590 tons, which, with the 1478 tons previously loaded, being of a bulky character, would have exhausted the carrying space of the ship, but would not have loaded her to her marks. The ship sailed for San Francisco, and three days afterwards the plaintiffs demanded payment of advance freight calculated on the basis of two-thirds of 4350 tons, the amount mentioned in the side clause of the charterparty. The defendants refused to pay advanced freight on 1478 tons, the amount destroyed or removed from the ship. Although they contracted as agents for the charterers, they consented to litigate the matter, and accepted responsibility in the event of the decision being against the charterers.

The Lord Chief Justice gave judgment for the defendants. (1) The plaintiffs appealed.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs. Upon the true construction of this charterparty the 1478 tons destroyed by fire ought not to be excluded in arriving at the amount of the advance freight payable. It is contended that, inasmuch as the 1478 tons added to the 2590 tons afterwards shipped would not have loaded the ship to her marks, the

(1) [1899] 1 Q. B. 193.

defendants must by the terms of the marginal clause pay advance freight on two-thirds of 4350 tons. Independently of that clause, it is contended that they would be liable to pay two-thirds freight in advance on all the goods shipped. It may be true that, there being a mutual exception of fire in the charterparty, the 1478 tons must be struck out of the capacity of the ship, so far as concerns the obligation of the charterers to provide cargo and the obligation of the shipowners to receive it: *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* (1); but it does not follow that the 1478 tons are to be struck out of the charterparty for the purpose of arriving at the amount of the advance freight. It was urged by the defendants that it was impossible that any freight could ever be earned in respect of the 1478 tons; but the amount of advance freight payable is not, by the terms of this charter, made to depend on an estimate of the total amount of freight that will be ultimately earned on discharge of the ship, because the printed clause making the freight payable on final discharge of the ship on the quantity to be delivered to the consignees is overridden by the written clause by which it is to be payable, two-thirds three days after sailing from the Tyne, "ship lost or not lost," and the balance on right delivery of cargo. Advance freight is not necessarily payable only as on account of freight to be ultimately earned: see *Oriental Steamship Co.* v. *Tylor.* (2) Advance freight has been said for some purposes to be in the nature of money paid in consideration of receipt of the goods for carriage on board the ship by the shipowner: see *Kirchner* v. *Venus* (3) and *Allison* v. *Bristol Marine Insurance Co.* (4) The shipowners have to incur expense in respect of the shipment of the goods destroyed; they have to bring the ship to the port of loading, and incur the liability to a general average contribution on the value of the ship. The meaning of the charterparty is that two-thirds of the agreed chartered freight is to be paid by way of advance freight provided the ship sails on her voyage. The charterparty does not say that the advance freight is to be calculated on the amount of goods on board when the ship

(1) [1894] 1 Q. B. 773.
(2) [1893] 2 Q. B. 518.
(3) (1859) 12 Moo. P. C. 361, at p. 390.
(4) (1876) 1 App. Cas. 209.

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sails, and the Court cannot put in a condition to that effect. In the absence of the exception of fire, the defendants would clearly have had to pay in advance two-thirds of the freight on 4350 tons, and the exception of fire makes no difference. The effect of that exception is only to excuse the charterers from the obligation to provide cargo, and of the shipowners from the obligation to carry it, to the extent of 1478 tons.

Joseph Walton, Q.C., and *Scrutton*, for the defendants. The Lord Chief Justice was right in holding that the 1478 tons must be deducted for the purpose of calculating the advance freight. The word "freight" must mean the same thing throughout the charterparty. The "two-thirds" must mean two-thirds of the amount of which the "balance" is to be paid on unloading and right delivery of the cargo. The sum being dealt with is the freight which will be payable on the cargo delivered, and this is evidenced by the provision in the marginal clause, "less pro ratâ freight on any quantity of cargo short delivered in San Francisco." If a cargo sufficient to bring the ship down to her marks had been put on board and some of it had been burned, the advance freight would be two-thirds of the only freight that could ever be payable, which could not include freight for the portion of cargo burned. So, if the marginal clause comes into force, the freight payable would depend on the agreed capacity of the ship less the freight which would have been attributable to the part of the cargo in respect of which freight cannot be earned. The clause providing that the advance freight shall be payable, ship lost or not lost, only means that the two-thirds is to be payable if the vessel has sailed whether she is lost or not lost, and has no bearing on the question how the amount of freight is to be calculated. The dictum of Lord Kingsdown in *Kirchner* v. *Venus* (1) as to advance freight being money paid for taking the goods on board for carriage is explained and qualified in *Allison* v. *Bristol Marine Insurance Co.* (2) See also *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (3)

Carver, Q.C., in reply.

(1) 12 Moo. P. C. 361, at p. 390. (2) 1 App. Cas. 209.
(3) [1891] 1 Q. B. 742.

A. L. SMITH L.J. This appeal raises a question on a charterparty, and we have been told that the dispute is not between shipowners and charterers, but between insurers on advance freight and on freight respectively.

By the charterparty the charterers were to do two things—they were to load a full and complete cargo and they were to bring the vessel down to her load-marks. There is a clause in the margin of the charter that if the charterers do not load the vessel to her marks there is to be a conventional figure taken as the number of tons which is the vessel's capacity of cargo, and that figure of 4350 tons is to be the basis on which freight is to be paid.

The question arises on the determination of the amount of advanced freight. The charterers were to load in the river Tyne or Tyne Dock a full and complete cargo of lawful merchandise, excluding certain specified kinds, "the cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause)," and the ship being so loaded was to proceed to San Francisco. The freight was to be paid "on final discharge at the rate of 16*s*., except on cargo shipped in Hull as hereinafter provided, per ton of 2240 lbs. on the quantity to be delivered to the consignees."

If, as I understand was the fact, the charterers did not load a cargo which would bring the ship down to her marks, the side clause, to which I have already referred as to the figure to be taken as the capacity of the vessel, takes effect. Then the freight "is to be due and paid as follows: Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo."

What happened is this. Part of the cargo was shipped, and before the time arrived for payment of the advanced freight the cargo so shipped, amounting to 1478 tons, was burned. The charterparty contains an exemption of peril by fire, and it seems to me that *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* (1) applies, and that, a portion of the cargo loaded having been destroyed by the exempted peril of fire, the charterers, although

(1) [1894] 1 Q. B. 773.

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they are bound to load a full and complete cargo, cannot be called on to ship fresh cargo in place of that burned, or to pay freight in respect of it. There is no further obligation on the charterers and no further right on the shipowners in respect of that portion of the cargo. Further, so much of the ship as was filled up by that part of the cargo becomes vacant, and the shipowners can fill it as they like, provided that they do not thereby delay the voyage.

It is clear, therefore, that as to the 1478 tons that were destroyed they were out of the question before the time came for paying advance freight. Then, on what was advanced freight to be paid? It is to be paid under the charterparty on the quantity of cargo delivered to the consignee. The 1478 tons are gone out of the venture, and I agree with the Lord Chief Justice that 4350 tons is the basis from which to start in determining the freight, but that from this must be deducted so much of the cargo as has been destroyed and on which no freight could ever be payable. That leaves as the difference between the two 2872 tons as the freight-earning capacity of the ship, and the two-thirds of the freight, which two-thirds is payable as advance freight, must be calculated on that basis. That seems to me the true meaning of the charterparty, and I think the Lord Chief Justice was right in his judgment, and that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion. I may say that my view has fluctuated during the argument, but I have come to the conclusion that the judgment of the Lord Chief Justice was right. The difficulty arises from the fact that the sum to be paid by way of advanced freight under the terms of the charterparty is an aliquot part of another sum, and the question to be determined is what is that other sum. That must depend on the terms of the charterparty which define that sum, namely, the freight. The difference is that on one side it is contended that the freight is finally ascertained as soon as the cargo is put on board, and so fixes once for all the amount of advance freight, irrespective of what may happen at the port of delivery. On the other side it is said that the freight

stipulated for as payable is freight which depends on the amount of cargo delivered at the port of discharge, because by the charterparty freight is to be paid on final discharge at a certain rate on the quantity of cargo to be delivered to the consignee. The charterparty goes on to say that two-thirds of the freight is to be payable three days after sailing from the Tyne, ship lost or not lost, and balance on unloading and right delivery of cargo. On that part of the charterparty the criterion of what is to be paid for freight is so much a ton on the cargo delivered to the consignee. But the marginal clause is applicable to the events that have happened in this case, since the charterers did not put on board sufficient cargo to bring the vessel down to her marks, and, therefore, 4350 tons is to be taken as the capacity of the vessel, and freight is to be paid on that basis. It must be noticed that the wording of the marginal clause does not support the contention that freight is necessarily to be paid on the whole estimated capacity of the ship, for it provides for a deduction of freight pro ratâ on any quantity of cargo short delivered in San Francisco, making the sum one which is to be ascertained either by actual knowledge or by a speculation as to what will be delivered at San Francisco. A strong point is made in the argument for the plaintiffs that in providing for the two-thirds advanced freight the parties must be taken to have excluded all that could happen at San Francisco, because they have inserted in the charterparty the undertaking expressed in the words "ship lost or not lost," shewing thereby an intention that the obligation to pay advanced freight should not depend on any speculation as to what was going to happen at the port of arrival. That, as the Lord Chief Justice points out, is not an answer to the case put forward by the other side, for it is an express provision that the calculation of the probable freight was to be displaced in one event, namely, the loss of the vessel. I agree that the provision for that one event does not cut down the rights of the parties with regard to other events provided for by the charterparty. Here certainty is substituted for speculation, and without the fault of either party a certain part of the cargo has been excluded from the possibility of earning freight. The

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delivery of that part of the cargo is not prevented by reason of the loss of the vessel, but by reason of fire for which the charterers have not undertaken responsibility, and which they are entitled to rely upon as excusing them from liability. That is taking the obligations under the body of the charter. If, instead of the words of the body of the charterparty, those of the side clause are taken, they are still more favourable to the charterers, because that clause provides for a deduction pro ratâ on any quantity of cargo short delivered. I think that as at the time advanced freight was payable it was known to the parties that as to a certain part of the cargo no freight could be payable, that fact must be introduced into the computation. Taking the basis of calculation as 4350 tons, a deduction has to be made in respect of cargo with regard to which no freight can by the terms of the charterparty be payable, and in respect of which the charterers have not made themselves liable to pay. I agree, therefore, with the decision of the Lord Chief Justice.

VAUGHAN WILLIAMS L.J. I agree. I think that the word "freight" in this charterparty is used in one sense and one only. There was a time in the history of the law, after the judgment in *Kirchner* v. *Venus* (1), when it was supposed that advanced freight and freight were different: that the former was a loan or a sum payable when the goods were put on board in consideration of their being received on board. So great an authority as Blackburn J. entertained that view, and entertained it at the time when he delivered his opinion in *Allison* v. *Bristol Marine Insurance Co.* (2) The opinions of the Law Lords in that case make it clear that that view was incorrect, and that "freight," whether used in respect of advanced freight or otherwise, always has the same meaning. It may be stipulated that it shall be payable on delivery of the goods or that a part shall be payable in advance, but every payment is a payment of the same freight. But, however true this may be, it is plainly within the competence of the parties to a charterparty to make stipulations regulating the payment

(1) 12 Moo. P. C. 361, at p. 390. (2) 1 App. Cas. 209.

of each part of the freight, and they constantly agree that the payment of that part which is payable in advance shall be independent of the delivery of the goods or the performance of the voyage. That, in my judgment, has been done by the terms of the charterparty that we have to consider. But stipulations as to the manner of payment of part of a sum of money do not alter the nature of the whole. What has happened in this case is that by reason of fire, which is a matter within the mutual exception clause in this policy, part of the ship has become vacant space not available for the carriage of goods under the charterparty. This fact alters the total freight out of which parts are payable at different times, but it does not alter the stipulations as to those payments. The charterparty continues to apply in its entirety, and the marginal clause applies, but, by reason of the fire, the total subject-matter in relation to which the term "freight" is used has been altered. This seems to me to be the outcome of *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* (1); but I wish to say that I should have arrived at the same conclusion independently of the decision in that case. The practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment, but they still remain parts of the one whole, and the alteration of the amount of the whole freight does not affect the stipulations as to the payment of the different parts.

Appeal dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Hollams & Co.*

(1) [1894] 1 Q. B. 773.

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[IN THE COURT OF APPEAL.]

RICE *v.* REED.

Trover—Waiver of Tort—Wrongful Sale of Goods—Joint Tortfeasors—Action against One in Trover and for Money had and received—Compromise by accepting Proceeds of Sale—Action of Trover against the Other—Election.

The plaintiff's servant wrongfully sold goods of his master to the defendant, who knew that the servant was improperly dealing with them, and the servant paid the proceeds of the sale into his account at his bank. The plaintiff brought an action against the servant and the bank, claiming as against the servant damages for conversion of the goods, and in the alternative for money had and received, and as against the servant and the bank an injunction to restrain them respectively until the trial of the action from drawing out or parting with the sum of 1500*l.* then standing to the servant's credit at the bank. The plaintiff applied for an interim injunction as above upon an affidavit that 1500*l.* at the least could be specifically traced to the servant's account as being moneys paid by the defendant for the goods wrongfully sold. An interim injunction was granted, but no further steps in the action were taken, an agreement being arrived at between the plaintiff and the servant that 1125*l.* out of the 1500*l.* then at the bank should be paid to the plaintiff in full settlement of all claims against the servant, without prejudice to the plaintiff's claim against the defendant. This agreement was embodied in a judge's order, but no judgment was signed. Before the agreement was made the plaintiff had brought an action against the defendant claiming damages for the conversion of the goods:—

Held, that the plaintiff had not, by his proceedings in the former action and by his dealings with the servant therein, elected to affirm the sale and to waive the tort, and the action against the defendant was maintainable.

Appeal from the judgment of Lawrance J. in an action tried by him with a jury. The action was to recover damages for the conversion of certain sawdust.

The plaintiff was a fur-skin dyer who in the course of his business used large quantities of sawdust for cleaning skins. The sawdust, after being thoroughly used, became waste sawdust and was of no value. A man named Soltau, who was in the plaintiff's employment, was entrusted with the duty of giving away the waste sawdust, and of seeing that no sawdust was sent away until it had been thoroughly used and was of no

value. Early in February, 1898, the plaintiff discovered that Soltau had been for some years wrongfully selling to the defendant sawdust which had not become waste sawdust, either by reason of not having been thoroughly used or not used at all; and on February 5, 1898, Soltau was given into custody on a charge of larceny and embezzlement, and on March 1 he was convicted. It appeared that Soltau kept a banking account at the Birkbeck Bank, and he had paid into his account the moneys received from the defendant on account of the purchase of the sawdust, amounting to upwards of 1500*l.* On February 19, 1898, the plaintiff brought an action in the Queen's Bench Division against Soltau and the trustees of the Birkbeck Bank, the claim indorsed on the writ being for—(1.) damages from Soltau, for that he, in the years 1891 to 1898 inclusive, converted to his own use and wrongfully deprived the plaintiff of the use and possession of a large number of bags of sawdust belonging to the plaintiff which Soltau wrongfully sold during the said period for sums amounting to upwards of 1500*l.*; alternatively to the claim in paragraph 1, (2.) payment by Soltau to the plaintiff of the sum of 1500*l.*, and whatever other sum or sums might be found to be due from Soltau to the plaintiff as money had and received by Soltau for the plaintiff's use, being the proceeds of the sale by Soltau of the sawdust belonging to the plaintiff and not accounted for by Soltau to the plaintiff; (3.) payment and transfer by the trustees of the Birkbeck Bank to the plaintiff of a sum of 1500*l.* then standing in their books to the account and credit of Soltau and any interest thereon; (4.) an injunction to restrain until the trial of the action or further order Soltau, his servants and agents, from in any way charging, incumbering, disposing of, drawing out, or otherwise dealing with the sum of 1500*l.* or any part thereof, and from receiving any interest due or to accrue due on the same or any part thereof; and to likewise restrain the trustees of the Birkbeck Bank from parting with out of their custody or in anywise dealing with the said sum or any part thereof and any interest thereon.

On the same day on which the writ in the action was served a summons was taken out for an interim injunction in the

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terms indorsed on the writ, and in support of the application an affidavit was sworn by the plaintiff, in which he said that he had discovered that for many years past Soltau had been selling sawdust from his (the plaintiff's) works to the defendant for at least 2*d.* a sack, and that Soltau had been paid by the defendant for such sawdust during the past six years sums amounting to upwards of 1500*l.*, the said sums having been paid by cheques drawn by the defendant on the London and South Western Bank in favour of Soltau, which were indorsed by Soltau and paid into his account at the Birkbeck Bank; that he had made inquiries from the trustees of the Birkbeck Bank, and was informed and believed that Soltau had till quite recently a very large account with the bank, far exceeding the sum of 1500*l.*, and that since his arrest on February 5, 1898, Soltau had withdrawn from the bank the whole of the moneys standing to his account at the bank except the sum of 1500*l.*; and that he was informed and believed that the sum of 1500*l.* at the least of the said account of Soltau could be specifically traced as being moneys paid to Soltau by the defendant by cheques as aforesaid for sawdust wrongfully sold by Soltau from the plaintiff's works, and that unless the Court granted the relief now asked for the whole object of the action would be frustrated. There was an affidavit filed on behalf of the Birkbeck Bank stating that the bank would submit to any order which the Court might consider right to make in the circumstances. On February 23 an injunction was granted restraining the defendants, the trustees of the Birkbeck Bank, until the trial of the action or further order from parting with out of their custody or in anywise dealing with the sum of 1500*l.* then standing in the bank to the account and credit of Soltau, or any part thereof or any interest thereon; and on March 8 an interim injunction was also granted restraining Soltau, his servants or agents, from in any way charging, incumbering, disposing of, drawing out, or otherwise dealing with the sum of 1500*l.* then standing to his account and credit in the bank, and from receiving any interest due or to accrue due on the same or any part thereof.

No statement of claim was delivered, nor were any further

steps in the action taken, but negotiations took place between the solicitors for Soltau and those acting for the plaintiff; and on May 24, 1898, Soltau's solicitors wrote to the plaintiff's solicitors a letter in which they stated that they had received instructions from their client, and they were prepared to make an offer on his behalf of 1125*l.* in settlement of all claims whatever against Soltau by the plaintiff, including the costs of the prosecution, the costs of the action, and the costs (if any) of the other defendants to the action, and also of carrying this proposition into effect; the sum of 1125*l.* to be paid out of the amount standing to Soltau's account at the Birkbeck Bank, and the balance to be paid to Soltau or as he should direct. On June 3 the plaintiff's solicitors wrote in reply, stating that on behalf of their client they agreed, in consideration of Soltau consenting to an application by their client for an order directing payment to their client of the sum of 1125*l.* (part of a sum of 1500*l.* then standing in the Birkbeck Bank) in respect of the sawdust (of the value of 5000*l.*) claimed by their client in the action, and of his costs incurred therein and in or in connection with the prosecution and conviction of Soltau, not to proceed any further in respect of the said sawdust against Soltau personally, and to stay all proceedings in the action; and they would also agree on behalf of their client to an order directing payment to Soltau of the sum of 375*l.*, the balance of the sum of 1500*l.* The letter concluded: "This agreement is without prejudice to our client's" (the plaintiff's) "claim against Mr. James Reed" (the present defendant) "and any other person or persons in respect of the said sawdust or otherwise in relation thereto." In pursuance of this agreement, on June 10, 1898, a judge's order was made directing the trustees of the Birkbeck Bank to pay to the plaintiff, out of the 1500*l.* and interest accrued in their hands as trustees of the bank, the sum of 1125*l.*, together with such interest or other accretions as might have accrued thereon since February 19, 1898, the same being accepted by the plaintiff in full settlement of all claims, costs, and damages, in whatever respect arising, against Soltau, and that the balance of the said principal sum of 1500*l.* —namely, 375*l.*—together with the interest or accretions due

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upon the same, be paid to Soltau's solicitors upon his written authority, and that the plaintiff should pay the costs of the trustees of the Birkbeck Bank to be taxed; and it was further ordered that the interim injunctions of February 23 and March 8 should be dissolved upon such payment as aforesaid. No judgment was signed upon this order.

In the meantime, on April 22, 1898, the present action was commenced, claiming 5000*l.* damages from the defendant for the conversion of the sawdust, the plaintiff alleging that Soltau had sold the sawdust to the defendant at an undervalue, and on May 20 the statement of claim was delivered. In this action the defendant pleaded, among other defences, that, if the sales of the sawdust were as against the plaintiff tortious, the plaintiff, with full knowledge of the facts, had ratified Soltau's authority to sell the sawdust, and had waived the tort, and was precluded from suing the plaintiff by taking proceedings by action in the High Court, by which the proceeds of the said sales were followed into the hands of Soltau's bankers and were received and kept by the plaintiff.

At the trial the jury were asked whether the defendant received the sawdust knowing it to have been stolen, or that Soltau was dealing with it in an improper manner; and they found that the defendant knew that Soltau was dealing with the sawdust in an improper manner. Lawrance J. upon further consideration gave judgment for the plaintiff for damages, if any, over and above the sum which the plaintiff had received from Soltau, to be assessed by an official referee.

The defendant appealed.

J. G. Witt, Q.C., and *Forman*, for the defendant. The plaintiff has by his conduct in the action against Soltau elected to waive the tort and to affirm the sales to the defendant. When the writ in the action against Soltau was issued there were two alternative claims indorsed thereon: one for conversion of the sawdust, and the other for money had and received to the plaintiff's use. At some time during the action the plaintiff would have had to elect upon which of those two claims he would proceed. The plaintiff, by applying

for an injunction to restrain Soltau and the Birkbeck Bank from parting with the money in the bank standing to Soltau's credit and by the affidavit which he filed in support of that application, conclusively elected to waive the tort and to proceed on the count for money had and received. The affidavit stated that the money in the bank was earmarked as the proceeds of the sale of the sawdust, and the plaintiff applied to have that money retained in the bank and not paid over to Soltau. That could only be done upon the footing that the money belonged to the plaintiff as the proceeds of the sale of the sawdust. That was conclusive evidence of an election to proceed on the count for money had and received and to waive the tort, because a plaintiff cannot at the same time affirm and disaffirm the transaction. If the plaintiff was proceeding on the count for conversion, he could not have obtained the injunction, because then the money in the bank would not have been his money, and execution before judgment is unknown. A plaintiff who has the option either to treat the defendant as a wrongdoer and to disaffirm his acts, or to treat him as his agent and to affirm his acts, having once affirmed his acts and treated him as an agent by accepting the proceeds of a wrongful sale of goods, cannot afterwards treat him as a wrongdoer: *Brewer* v. *Sparrow*. (1) In that case the defendant wrongfully sold certain stock-in-trade of a bankrupt, and the bankrupt's assignees, having received the accounts of the sale and having accepted from the defendant the balance appearing due on the accounts, were held not entitled to maintain trover against him. That case was followed by *Smith* v. *Baker* (2), where an application was made to the Bankruptcy Court by a trustee in bankruptcy to declare a bill of sale void as against himself, and to order the grantee, who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale. The Court made the order, and, the grantee having paid to the trustee the proceeds of the sale, it was held that the trustee could not afterwards bring an action of trover against the grantee, as he had by the proceedings in bankruptcy affirmed the tortious sale and waived the tort. The Court there said

(1) (1827) 7 B. & C. 310. (2) (1873) L. R. 8 C. P. 350.

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that the proceedings in bankruptcy were equivalent to an action for money had and received, which would be a conclusive election to waive the tort. Those were cases where there was only one tortfeasor; but the principle is the same where there are joint tortfeasors, as in the present case; for the cause of action against joint tortfeasors is one and indivisible, and, if the plaintiff waives the tort as against one and elects to proceed for money had and received, he has waived the tort as against both, and he cannot afterwards proceed in tort against the other. In *Valpy* v. *Sanders* (1) it was held that the mere sending in by the assignees of a bankrupt of an account for goods as upon a sale by the bankrupt after the committal of an act of bankruptcy and a demand for payment, which was refused, did not amount to an affirmance of the sale so as to preclude the assignees from maintaining trover. In *Morris* v. *Robinson* (2), where the proceeds of the sale of a cargo improperly sold abroad were lodged in the Vice-Admiralty Court, it was held that the fact that the cargo owner made an unsuccessful application for payment out of this sum was not an affirmance of the sale. In both these cases there was a mere demand not followed by the receipt of the money by the plaintiff, the Court in *Valpy* v. *Sanders* (1) saying that there was only a qualified offer to adopt the sale, which the defendant did not accept. Those cases are different from the present, where the plaintiff has claimed the money at the bank as his own, and has received it in satisfaction of his claim against Soltau. *Burn* v. *Morris* (3) is not against this view, as there was there merely a receipt of a portion of the proceeds of a bank-note which the plaintiff had lost, and which the defendant had converted to his own use. That was obviously not a waiver of the tort. Those cases do not touch the present case. The plaintiff, by his dealings with Soltau, must be taken to have waived the tort, not only as against Soltau, but also as against the defendant, and to have elected to adopt the sale. The judgment should, therefore, be entered for the defendant.

[They also referred to *Brinsmead* v. *Harrison*. (4)]

(1) (1848) 5 C. B. 886.
(2) (1824) 3 B. & C. 196; 27 R. R. 322.
(3) (1834) 4 Tyrw. 485.
(4) (1872) L. R. 7 C. P. 547.

Sir Edward Clarke, Q.C., C. F. Gill, Q.C., and *J. F. W. Galbraith*, for the plaintiff, were not called upon.

LORD RUSSELL of KILLOWEN C.J. This is an action of trover. At the trial only one question was answered by the jury, and the question which they answered was this: Did the defendant receive the sawdust knowing it to have been stolen, or that Soltau was dealing with the sawdust in an improper manner? The jury apparently did not say in terms that the defendant knew that the sawdust was stolen, but they found that the defendant knew that Soltau was dealing with it in an improper manner. We have, therefore, no assistance from the jury upon the question which we have now to decide; but I assume that for the purpose of deciding it we are entitled to draw such inferences of fact as are proper to be drawn from the admitted or proved facts in the case, and are not inconsistent with the finding of the jury. The question before us is whether the plaintiff is estopped from maintaining this action of trover by reason, as is alleged by the defendant, of his having by his dealings with Soltau elected to waive the tort and to affirm Soltau's authority to deal with the sawdust as he did.

Now, it seems clear to me that the plaintiff, in his dealings with Soltau, never had any intention in fact of foregoing his remedy against the defendant. That seems to me to be shewn by the fact that, whereas the sawdust improperly dealt with was valued by the plaintiff at 5000*l.*, he only received 1125*l.* and interest from Soltau; and by the further fact that, when agreeing to accept that sum from Soltau, he expressly stipulated that he received it without prejudice to his claim against the defendant. The facts are these: The plaintiff is a fur-skin dyer, and he was in the habit of using in that business large quantities of sawdust. When the sawdust had been fully used for the purposes of his trade, it became waste sawdust, and was treated accordingly. Soltau, the plaintiff's servant, had made an arrangement with the defendant with reference to the fully used sawdust, and he also sold to the defendant sawdust some of which had been only partly used and some entirely unused.

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It is alleged by the plaintiff that the sawdust so improperly dealt with was of the value of 5000*l*. It appears that the plaintiff's suspicions were aroused, and on February 5, 1898, Soltau was given into custody on a charge of larceny and embezzlement, and on March 1 he was convicted. Before his conviction an action was brought by the plaintiff against Soltau, which, so far as the pleadings are concerned, did not go further than the writ. The writ in that action was indorsed with a claim for conversion, and in the alternative with a claim for money had and received. Bearing in mind the finding of the jury that the defendant, when he received the sawdust, knew that Soltau was dealing with it in an improper manner, it is clear that both Soltau and the defendant were parties to acts of tort against the plaintiff in respect of which they were separately liable, though in one sense it may be said that the acts were joint acts of tort.

In that condition of things an application was made by the plaintiff for an injunction, and in support of that application the plaintiff made an affidavit, which to my mind creates the only difficulty in this case. In the affidavit the plaintiff stated in effect that he had made inquiries and ascertained that there was a balance of 1500*l*. to the credit of Soltau at the Birkbeck Bank; that the proceeds of the sale of the sawdust were paid into Soltau's account at the bank, and that 1500*l*. at the least of that account could be specifically traced as the proceeds of the sale of the sawdust by Soltau to the defendant. He thereupon asked for an injunction to restrain Soltau from drawing out that sum and the bank from parting with it until the trial of the action. That is no doubt an important fact to bear in mind. It was an application, it should be observed, for an interim injunction, and an interim injunction was granted. Beyond question, if, assuming the action were tried, the plaintiff had been so ill-advised as to take a verdict and judgment upon the count for money had and received, that would have been a conclusive election on his part to waive the tort, and he could not thereafter have maintained this action against the present defendant. But that was not what happened in this case. Having obtained the interim injunction, he com-

menced the present action against the defendant on April 22. The statement of claim, which was delivered on May 20, shews that the plaintiff was claiming damages for the conversion calculated upon the true value of the sawdust improperly dealt with. The next fact in order of date was the arrangement between the plaintiff and Soltau, which, stated shortly, was this, namely, that the sum of 1125*l.*, part of the 1500*l.* at the bank, together with the interest accrued due thereon, should be paid out to the plaintiff in full settlement of all claims against Soltau, but without prejudice to the plaintiff's claim against the present defendant. So much for the plaintiff's claim against Soltau. The action against the present defendant was continued, and came on for trial before Lawrance J. and a jury, when the jury answered one question as I have already stated, and we have now to draw all proper inferences of fact not inconsistent with the finding of the jury.

The question we have to decide is, whether we are obliged, upon any rule of law, to hold, contrary to the expressed intention of the plaintiff, that the plaintiff has so acted that he must be taken as having conclusively elected to affirm the sale of the sawdust by Soltau to the defendant and to treat it as a valid sale. In my opinion we are not obliged so to hold. It is true that there was an alternative claim upon the writ in the action against Soltau, and the writ was followed by an arrangement which it is difficult to explain except upon the hypothesis that the plaintiff was seeking to get the money in the bank as money had and received to his use—that is, that he treated the money as his own. That, no doubt, raises a difficulty; but, upon the whole, I do not think that it is such as to prevent him from maintaining his present action. Having regard to the authorities, and especially to those referred to in *Valpy* v. *Sanders* (1), I cannot think that we are bound to assent to the contention urged upon us on behalf of the defendant. I regard the case of *Morris* v. *Robinson* (2) as having a most important bearing upon this point. In that case a quantity of indigo, which had been shipped at Calcutta, was improperly sold under an order of the Vice-Admiralty Court at the Mauritius, and the

(1) 5 C. B. 886. (2) 3 B. & C. 196; 27 R. R. 322.

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proceeds were paid into court. The owner of the indigo was held entitled to maintain an action against the purchaser of the indigo, notwithstanding that the plaintiff's agent, acting under a power of attorney from the plaintiff, had made an unsuccessful application to the Vice-Admiralty Court for the proceeds of the sale of part of the indigo paid into court. That case would seem to establish the proposition that an application of a judicial kind to a judicial court to obtain the proceeds of goods improperly converted is not conclusive proof of election to affirm the sale. In the present case there was no application by the plaintiff to have the money in the bank paid out to him. There was merely an application for an injunction to restrain Soltau from drawing the money out and the bank from parting with it until the trial of the action, and an injunction in that form was granted. Then there is the case of *Burn* v. *Morris* (1), which seems to me to be also of some importance in relation to the question before us. In that case an action of trover was brought for a bank-note for 20*l.* which the plaintiff had lost, and which the defendant had apparently honestly received from the person who found it for the purpose of getting it changed at the bank. It was held that the plaintiff was entitled to maintain trover although he had received part of the proceeds of the note from the person who originally found it. Those cases seem to establish two propositions: first, that an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction; and, secondly, that the receipt of part of the proceeds is not conclusive proof of election.

In the present case it is to be noticed that the money was obtained from the bank under a compromise, and one cannot shut one's eyes to this fact, when determining what is the proper inference to be drawn from the circumstances of the case, namely, that the receipt of the money by the plaintiff was in relief of the defendant, and went in diminution of the damages payable by him, as the defendant will get the benefit of the money received from the bank. Upon the whole, I have

(1) 4 Tyrw. 485.

arrived at the conclusion that there are no such circumstances in this case as to oblige the Court to say that the plaintiff has, by his dealings with Soltau, conclusively elected to affirm the sale of the sawdust by Soltau to the defendant so as to be estopped from maintaining this action against the defendant. The appeal must, therefore, be dismissed.

A. L. SMITH L.J. I am of the same opinion. The action is one of trover for certain sawdust sold by Soltau to the defendant, and the jury have found that the defendant knew that Soltau was dealing with the sawdust in an improper manner. The plaintiff claims the value of the sawdust, which is said to be 5000*l*. The defendant sets up this defence. He says that the plaintiff cannot sue him in trover because the plaintiff has already sued the actual thief, Soltau, and by the manner in which he sued Soltau and by his dealings with him in that action he has affirmed the contract of sale between Soltau and the defendant and waived the tort. There are authorities which undoubtedly say that, when a tort has been committed and an action is brought by the person against whom the tort has been committed for money had and received in respect of the tortious act, that affirms the transaction and waives the tort. The Courts have held that by suing for money had and received instead of in tort the plaintiff has conclusively elected to waive the tort. With those cases I entirely agree. In the present case the plaintiff sued Soltau in trover, and in the alternative for money had and received. If nothing more had occurred, no Court could say that the plaintiff, by suing in the alternative for tort and for money had and received, had waived the tort and elected to affirm the transaction. It is clear that no authority goes so far as that. In the present case the plaintiff went on, and obtained an interim injunction until the trial of the action against Soltau and the bank, restraining the bank, who had in their possession 1500*l*. of the proceeds of the sale of the sawdust, from parting with that sum, and Soltau, to whose credit that sum was standing, from drawing it out. The motive with which that application for an injunction was made is obvious. It was made for the purpose of saving

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something out of the loss, estimated by the plaintiff at 5000*l.*, which he had sustained, and the interim injunction was obtained in an action in which he was claiming damages in trover, and in the alternative money had and received. How does that shew a conclusive election to proceed on the contract and to waive the tort? The plaintiff merely did what he could to save something from the loss. There is a passage in the judgment of Bovill C.J. in *Smith* v. *Baker* (1) which seems to me to be apposite to the present case. He says: "But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way." He treats them both on the same footing. But where is there any conclusive election either way if the claim is in the alternative for trover and for money had and received? The Chief Justice then proceeds: "The principles which govern the subject are very well illustrated in the case of *Buckland* v. *Johnson* (2), where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received. There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law." I entirely agree with those observations. In this case as a matter of fact the plaintiff never intended to waive the tort, and nothing that he has done has had that effect.

VAUGHAN WILLIAMS L.J. I am of the same opinion. The key to this case seems to me to lie in the fact that there has been no judgment of the Court which can be relied upon by the defendant as an estoppel, there having been only a consent order stating that the sum of 1125*l.* with the accrued interest

(1) L. R. 8 C. P. 350, at p. 355.
(2) (1854) 15 C. B. 145; 23 L. J. (C.P.) 204.

thereon, to be paid out to the plaintiff by the bank, is accepted by him in full settlement of all claims against Soltau. If there had been, as has been suggested, a judgment in trover in which damages for the tort had been assessed otherwise than by compromise—for the fact that the arrangement arrived at here was a compromise is, in my judgment, of some importance—I agree that the present defendant would have been entitled to our judgment. But there has been no judgment here in trover, either by compromise or otherwise. Again, if there had been a judgment for money had and received, the plaintiff would have conclusively waived his right to proceed in tort, and in such a case the waiver would enure for the benefit of those claiming through the defendant in that action.

The present case is entirely different, for, though the agreement has been drawn up in the form of an order of the Court, it is perfectly plain upon its face that it was a consent order; and when we look at the correspondence it becomes clear that when the consent was given the plaintiff reserved his rights against the present defendant. I wish to point out that, where the action is to recover damages for tort, the right of the plaintiff by contract, when dealing with one tortfeasor, to reserve his rights against the other tortfeasor is much stronger than it is in the more frequent case of an action of contract. No one doubts that where there is a claim upon a contract, if the plaintiff chooses to compromise his claim against one joint debtor, and by the arrangement reserves his rights against the other joint debtor, that prevents the latter from setting up the compromise as a defence to an action on the contract against himself. A fortiori, that must be the case where the action is in tort, inasmuch as there is no contribution between joint tortfeasors. (1)

Appeal dismissed.

Solicitors for plaintiff: *Firth & Co.*
Solicitor for defendant: *J. Westcott.*

(1) See in connection with this subject, *Duck* v. *Mayeu*, [1892] 2 Q. B. 511.

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[IN THE COURT OF APPEAL.]

ELLIS, Appellant *v.* ASSESSMENT COMMITTEE OF CAMBERWELL UNION, Respondents.

Metropolis — Rate — Quinquennial Valuation — Provisional Valuation List — Supplemental Valuation List—Alteration in Value of Hereditament—Onus of Proof—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.

In order to justify an alteration of the quinquennial valuation of a hereditament by a provisional or supplemental valuation list under the Valuation (Metropolis) Act, 1869, ss. 46, 47, there must have been an alteration in the value of the hereditament from circumstances peculiar to the particular hereditament, or a class of hereditaments to which it belongs; an alteration in the value of the hereditament arising from a cause which affects the value of all the hereditaments in the list in common, such as a general rise in value produced by general prosperity, will not justify an alteration of the valuation of the hereditament during the quinquennial period.

The onus of shewing that an alteration in value is peculiar to the particular hereditament or class of hereditaments lies upon the authority seeking to alter the valuation. Therefore, mere proof of the rise in value of a hereditament without shewing that this arises from circumstances peculiar to it or a class of hereditaments to which it belongs will not justify an alteration of the valuation during the quinquennial period.

Appeal from a decision of a Divisional Court (Lawrance and Channell JJ.) upon a case stated by the London Quarter Sessions upon an appeal against the supplemental valuation list for the parish of Camberwell for the year 1897.

The appellant was, and had been since October, 1896, the occupier of a public-house known as the Adam and Eve, High Street, Peckham, in the parish of Camberwell. At the quinquennial valuation in 1895 the gross and rateable values of the public-house were fixed at 485*l.* and 405*l.* respectively, which values were duly entered in the quinquennial valuation list made in that year. By a provisional list made in December, 1896, the assessment of the public-house was increased by the overseers to 600*l.* gross and 500*l.* rateable value, and objection was made by the appellant to the increased assessment on the

ground that the said public-house had not in the course of the year in which the provisional list was made increased in value by the addition thereto or erection thereon of any building, nor had there been any increase of value from any cause within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. At the hearing of the objection the assessment committee endeavoured to get from the appellant information as to the premium given by him for the lease of the public-house. This information the appellant refused to give, and the assessment committee, after hearing the objection and viewing the public-house, reduced the assessment to 575*l.* gross and 485*l.* rateable value.

In the supplemental valuation list made in 1897 the appellant's public-house was again valued and assessed at 575*l.* gross and 485*l.* rateable value. The appellant objected to the valuation, and, on appearing before the assessment committee, contended, inter alia—(1.) that the public-house had been improperly included in the provisional list and therefore ought not to be included in the supplemental list, and that it was therein too highly rated; (2.) that no alteration in the value of the public-house had taken place during the twelve months preceding the making of the supplemental list within the meaning of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869; (3.) that the overseers were not in law entitled to consider, or in any way to act on any sum of money paid or supposed to have been paid for the public-house either since the date of the valuation list in force at the time of the making of the provisional list or at all.

The assessment committee, after hearing the objections, refused to give the appellant any relief, and he appealed to the London Quarter Sessions.

At the hearing of the appeal, counsel for the appellant objected to any questions being asked or any evidence being given about the premium paid by the appellant. The Court, however, overruled the objection, and the fact was elicited by the respondents on cross-examination that the appellant had paid 16,400*l.* as the consideration for his lease. No evidence was given as to the precise amount of the premium paid in

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1895 or any time previously, but it was admitted by one of the appellant's witnesses that, assuming the valuation appearing in the quinquennial list made in 1895 to have been calculated according to the method usually adopted in the parish of Camberwell, the valuation must have been based on a supposed payment of a premium of about 6400*l*. The assessment committee, however, at the time of the revision of the quinquennial valuation list did not in fact know the precise amount of the premium which had been paid by the then occupier.

Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that, in his opinion, the annual value of the said public-house had between April and October, 1896, increased by about 100*l*. It was, however, admitted that there had been no structural alteration of the public-house. No evidence was given of any circumstances specially affecting the annual value of the public-house. The respondents contended that they were not bound to give any such evidence, but that it was enough for them to shew that the value had in fact increased. It was further admitted that no public-houses had been placed in the provisional or supplemental lists except such as had in fact been sold since the date of the quinquennial valuation thereof, although public-houses in the neighbourhood had generally increased in value.

For the assessment committee it was contended that it was not necessary that there should be a structural alteration of the rated premises in order to warrant their insertion in a supplemental list; that the facts before mentioned as to the premium given for the lease of the public-house were evidence of an alteration in matters stated in the quinquennial valuation list during the twelve months preceding the making of the supplemental list under s. 46 of the Valuation (Metropolis) Act, 1869; and that the payment of the premium shewed that there had been such a material and unforeseen alteration of the value of the public-house as to warrant its insertion in the supplemental list.

For the appellant it was contended that the facts above

mentioned were not in law any evidence of an alteration within the meaning of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869, and that all evidence as to the amount of premium paid by the appellant for the public-house in October, 1896, was irrelevant and inadmissible, and that the amount of the premium in the absence of any evidence, save as hereinbefore stated, as to the premiums previously paid, would not afford any indication of an alteration in the value of the public-house. The court of quarter sessions gave judgment in the following terms: "We find that although there has been no structural alteration in the appellant's premises between 1896 and April, 1897, there has been an alteration in value in these premises by way of increase in that period. The appellant has failed to establish in our opinion that the alteration in gross and rateable values made by the assessment committee in the supplemental list is in excess of the actual increased value within the statutory period, and we confirm the alteration of the list made by the assessment committee with costs." The values in the supplemental list were, therefore, ordered to remain as assessed by the assessment committee.

The questions for the opinion of the Court were: (1.) Whether the alteration in value which took place during the twelve months preceding the making of the supplemental valuation list was in law an alteration within the meaning of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869; (2.) whether the amount of premium paid by the appellant in October, 1896, for the said premises ought to have been received in evidence; (3.) whether the amount of the premium was in law any evidence of an alteration within the meaning of the beforementioned sub-section. If the Court should answer all the foregoing questions in the affirmative the order of sessions was to be affirmed, and if the Court should answer all or any of the questions in the negative then either the order of sessions was to be quashed and the gross and rateable values of the public-house were to be reduced to 485*l.* and 405*l.* respectively, or the premises were to be struck out of the supplemental valuation list, or the Court was to make such further or other order as to the Court should seem fit. The Divisional Court answered all

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the questions in the affirmative, and affirmed the order of quarter sessions.

Nov. 3. *Littler, Q.C.*, and *Page, Q.C.* (*William Russell* with them), for the appellant. In order to justify the alteration of the quinquennial valuation of a hereditament by provisional or supplemental list under the Valuation (Metropolis) Act, 1869, ss. 46, 47, there must have been an alteration of the value of the hereditament from circumstances peculiar to that particular hereditament, as in the case of *Reg.* v. *New River Co.* (1) The alteration in value contemplated by those sections is no doubt not confined to an alteration in consequence of a structural addition to the premises: see *Reg.* v. *St. Mary, Islington, Assessment Committee* (2); but it must be so far ejusdem generis with such an alteration as that it must be in consequence of something affecting the individual premises as opposed to something affecting the value of premises in general in the locality. The general scheme of the Act is that the quinquennial valuation shall remain in force for five years, subject to alteration during that period by provisional and supplemental valuation lists under ss. 46, 47 in cases where there has been an alteration in value peculiar to particular hereditaments in the parish. The provisions of s. 43 shew this to be so. If any alteration in value from whatever cause would bring a case within ss. 46, 47, there is no good in having a quinquennial period at all. Of course, the same circumstances may peculiarly affect the particular hereditament in company with some others. For instance, a cul-de-sac may be turned into a thoroughfare, which may increase the value of a particular shop in the street, and at the same time increase the value of other shops in the street. It may be admitted that in such a case there would be an alteration in value of each of the shops within s. 47. In the present case the evidence was merely that public-houses throughout the metropolis had increased in value, and that the appellant had paid a premium of 16,400*l.* for his lease. The evidence of a rise in value, if any, is perfectly consistent with its having been part of a general

(1) (1879) 4 Q. B. D. 309. (2) (1887) 19 Q. B. D. 529.

rise of values in the locality through general prosperity. The fact of the appellant having given a premium of 16,400*l.* in 1896 cannot in itself be evidence of a rise in value since 1895, there being no evidence of any other premium previously given with which to contrast it, or anything of that sort. Besides, the premium given for a lease, probably in consequence of the competition by brewers for leases of public-houses with a view to letting them as tied houses, has no bearing on the question what the rent paid by a tenant from year to year would be.

[They also cited *Bradford-on-Avon Assessment Committee* v. *White* (1); *Dodds* v. *South Shields Assessment Committee* (2); *Reg.* v. *Poplar Union Assessment Committee.* (3)]

Macmorran, Q.C., and *Ryde*, for the respondents. The quarter sessions have found that there was an increase of the value of this public-house within the year before making the supplemental list, and, if there was any evidence to support that finding, this Court cannot review or interfere with it. There was evidence before the sessions of an increase in the value of public-house property in 1896 throughout London which affected this particular public-house. It is submitted that this constituted some evidence of an alteration within s. 46, and of an increase of value within s. 47 of the Valuation (Metropolis) Act, 1869. It has been held that the provisions of s. 47 are not confined to an increase or reduction of value from causes ejusdem generis with structural alteration, but apply to an increase or reduction in value "from any cause" whatever: see *Reg.* v. *St. Mary, Islington, Assessment Committee.* (4) If the overseers find that a particular property has increased in value, they are bound, whatever the cause may be, to insert it in the provisional or supplemental list, as the case may be. The fact that the rise in value may have affected other property in the parish is immaterial, provided that it has affected the particular hereditament in question. In this case there was evidence from which the sessions were entitled to infer an alteration in value peculiar to a particular class of

(1) [1898] 2 Q. B. 630.
(2) [1895] 2 Q. B. 133.
(3) (1884) 13 Q. B. D. 364.
(4) 19 Q. B. D. 529.

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property, and affecting this property as a member of that class. It cannot be said that the evidence of the premium paid by the appellant for his lease was inadmissible. It formed an element to be taken into consideration in connection with the admitted fact that according to the method of assessment usually adopted in Camberwell the quinquennial valuation must have been based on a supposed payment of a premium of about 6400*l*.

Littler, Q.C., in reply.

Cur. adv. vult.

Nov. 18. The judgment of the Court (Lord Russell of Killowen C.J., A. L. Smith L.J., and Vaughan Williams L.J.) was read by

VAUGHAN WILLIAMS L.J. The 43rd section of the Valuation (Metropolis) Act, 1869, which, as the preamble states, was passed to secure uniformity in the assessment of rateable property in the metropolis, provides that the valuation list shall last for five years "subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." Now, alteration is provided for in s. 46 and s. 47. The former provides for supplemental valuation, the latter for provisional valuation. Supplemental valuation takes place at the end of each year. The old list is then to be supplemented by making a new list of all the alterations which have taken place within the last twelve months. If there are no such alterations which make a supplemental list necessary in any of the matters in the valuation list (which, of course, includes gross and rateable value) the overseers are to send to the assessment committee a certificate to that effect. Provisional valuation deals with the alteration by increase or decrease in value of a particular hereditament "from any cause" during the twelve months. The provisional valuation takes effect immediately, and remains in force till the making of the supplemental or other valuation list at the end of the year. The alterations in the supplemental list seem to be the confirmed provisional valuations. It seems to follow that whether one is dealing with the supplemental list or with the provisional list the question whether there has been such an alteration in the

value of the premises as to justify an alteration in the valuation seems to be the same in either case.

Now, what are the conditions of such an alteration? It seems to us they are these: (1.) The alteration in value must be such that, if the fact relied on as constituting the alteration had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment; (2.) that the fact constituting the alteration in value should affect the hereditament in question in particular. We do not think that a general rise in values would be a fact constituting such an alteration. This, it seems to us, would be inconsistent with the expressed intention of the Act that the valuation list should remain in force for five years. Moreover, we do not think that the mere proof of a rise in value of a class of hereditaments including the one sought to be dealt with by the provisional or supplemental valuation would of itself justify a new valuation under ss. 46 and 47, because such a rise in no way negatives a general rise in the values of hereditaments of all classes. After all, the rise in the value of licensed houses generally depends on a general cause, such as prosperous times, which give the mass of the people more money to spend in the luxuries of life, or more to spend in drink, or bread, or meat, or clothing, or sight-seeing, or houses, or anything else. The licensed victualler will obtain a better price if he sells his public-house; the butcher or the baker will obtain a better price if he sells his business. Theatres and music-halls will be easy to sell. Houses and leases will command good prices to let and to sell. All this flows from one cause—the prosperity of the people. We do not think ss. 46 and 47 apply in such a case to any class of hereditaments increased in value as a class by a cause affecting all classes, such as general prosperity. The fact, however, that the increase in value affects a class as a whole will not exclude the increase from the operation of these sections, provided it is shewn that the increase of value arises from some cause affecting merely the class, and not from the cause of general prosperity affecting all classes of the community—e.g., if the taste for cycling makes factories which are conveniently situated for this manufacture

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command higher prices to sell or to let, this is a cause affecting a class—namely, premises suitable for cycle manufacturing which go up in value by reason of a new fashionable taste; but the cause is independent of general prosperity of the community, and such an increase in value would justify an alteration under ss. 46 and 47 during the currency of the quinquennial period of the assessment. The same would be true if war sent up the value of premises licensed for the purpose of carrying on the manufacture of gunpowder, the cause of increase of value being independent of general prosperity. But in each case it is for those who alter the assessment to prove the nature and cause of the alteration in value. It is easy to do this where the increase of value arises from some local cause affecting a class or some hereditaments in a class—for instance, where the building of a bridge sends up the value of the houses of a street thus made more accessible, or the removal of a cul-de-sac makes the houses in a street of shops more valuable from an increased traffic through the street, or the houses in a residential street less valuable from the increase of noise. Betterment or depreciation of such a character affecting all or some of the houses in a street is clearly within ss. 46 and 47, and the cause of the increase in value is easy of proof. The proof is more difficult where the cause of the increase in value is not a local physical cause; but, in our judgment, the onus of proving that the cause of the alteration in the value of the hereditament in the preceding twelve months is a cause which does not affect all classes is clearly on those who seek to have a provisional or supplemental list made.

These being the conditions for the application of ss. 46 and 47, let us see how far the facts stated in the special case shew that there has been within the twelve months an alteration in the value of this public-house. Two sorts of alteration are alleged. First, a witness says in his opinion the value of the particular public-house increased by 100*l.* a year in the twelve months in question, and he attributes this to the rise in value of licensed houses throughout the metropolis. For the reasons which we have given we do not think that the onus on those who seek to say that there has been an alteration in value

within the meaning of these sections is satisfied by proof of a rise in value which is consistent with a general rise resulting from general prosperity. Secondly, it is said that the fact that this public-house has just been sold for 16,400*l.* is evidence of an alteration in value within the twelve months. We think not. It may be that 16,400*l.* was the very sum the vendor paid on going into possession in or prior to 1895. It is said not so, because in such a case the valuation in 1895 would have been higher than it in fact was. That, however, depends upon how much of that 16,400*l.* the assessment committee apportioned to personal goodwill or other matters not affecting the letting value of the public-house: see *Bradford-on-Avon Assessment Committee* v. *White*. (1)

The questions at the end of the special case we answer as follows: The answer to question 1 is, No; there is nothing in the facts stated in the case nor in the evidence stated to have been adduced sufficient to justify the conclusion that the alteration which took place during the twelve months preceding the making of the supplemental list was in law an alteration within the meaning of s. 46. It is quite consistent with such facts and evidence that the alteration in value resulted from general prosperity. The answer to question 2 is, Yes; and to question 3, No; for although evidence of the amount of the premium is admissible, the amount of the premium was not in law any evidence of an alteration within s. 46 unless some evidence was given of the premium previously paid beyond that which appears by the case to have been given.

Appeal allowed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitors for respondents: *Marsden & Son.*

(1) [1898] 2 Q. B. 630.

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Nov. 13.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL ON THE RELATION OF THE WARWICKSHIRE COUNTY COUNCIL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Level Crossing—Speed of Trains—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 48—*Infringement of Statute by Public Body—Information by Attorney-General—Injunction—Injury to Public, Evidence of not necessary.*

Upon an information filed by the Attorney-General to restrain a public body with statutory powers from infringing a term introduced into their Act in the interests of the public, as a condition of the exercise of their powers, it is not necessary to prove that injury to the public results from that infringement.

A railway company was by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, empowered to carry their railway across a turnpike road on the level. They constantly drove their trains over the level crossing, which adjoined a station, at a speed exceeding four miles an hour, in contravention of the provisions of s. 48 of the Railways Clauses Consolidation Act, 1845.

On an information filed by the Attorney-General to restrain them from so doing, they set up by way of defence that there was no proof of any injury occasioned to the public by their contravention of the section, and that the inconvenience caused to the public by reason of the existence of the crossing would be increased if they complied with it:—

Held (affirming the judgment of Bruce J.), that, as the information was filed by the Attorney-General to enforce the express terms of an enactment made by the Legislature in the interests of the public, the Court could not entertain the question whether injury to the public was in fact occasioned by the contravention of the Act, but were bound to grant the injunction.

Attorney-General v. *Great Western Ry. Co.*, (1872) L. R. 7 Ch. 767, *Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, and *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*, (1882) 21 Ch. D. 752, followed.

APPEAL from the judgment of Bruce J. (1), upon an information filed by the Attorney-General, granting an injunction against the defendant company to restrain them from allowing

(1) [1899] 1 Q. B. 72.

their trains to cross the Watling Street at the level crossing adjoining Atherstone Station at a speed greater than four miles an hour.

The facts, which are set out more fully in the judgment of Bruce J. in the Court below (1), may for the purposes of this report be stated as follows. The Trent Valley Railway Act, 1845 (8 & 9 Vict. c. cxii.), which incorporated the Railways Clauses Consolidation Act, 1845, empowered the railway company to carry their railway across a turnpike highway called Watling Street on the level. The 48th section of the Railways Clauses Consolidation Act, 1845, enacts that "where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour; and the company shall be subject to all such rules and regulations with regard to such crossings as may from time to time be made by the Board of Trade." It was admitted that for a long time past the company had disregarded that provision, and had constantly caused trains to cross the level crossing in question, which adjoined the Atherstone railway station, at a speed greatly exceeding four miles an hour. The crossing was on the defendants' main line. It was stated that about 120 express, passenger, or goods, trains passed over it in every twenty-four hours; and there was no doubt that the vehicular traffic on the road was seriously impeded by reason of the railway traffic. The railway was worked upon the block system under regulations approved by the Board of Trade. Under this system the line was divided into sections, and the gates at the level crossing were kept closed across the road so long as any train was within the limits of the section in which the crossing was situate. The section extended 1340 yards from the crossing in one direction and nearly the same distance in the other direction, so that before the approach of a train within a distance to cause danger to vehicular traffic the gates were closed across the road, and kept so closed until the train had passed to a safe distance in the other direction. The result was that the gates were kept closed across the road from five to fifteen minutes at a

(1) [1899] 1 Q. B. 72.

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time, and were ordinarily kept closed against the public during the twelve hours extending from 6 A.M. to 6 P.M. for a period ranging from 275 to 319 minutes, and for an average during each hour during that period varying from twenty-three to twenty-six minutes. Before Bruce J. it was contended for the defendants that he had a discretion with regard to granting the injunction, and was not bound to grant it merely on proof of a breach of the provisions of a statute; and that he ought not to do so, because there was no proof of injury thereby occasioned to the public, but, on the contrary, the inconvenience to the public would be greatly increased if the company were obliged to slow down the speed of all their trains to four miles an hour as they approached the level crossing, inasmuch as under the block system above mentioned the gates would have to be kept closed across the road for a longer period in consequence of the train remaining for a longer time in the section. The learned judge in substance held that he was bound to give effect to the express terms of the Act, and could not inquire whether the result of the disregard by the defendants of its provisions was injurious in point of fact to the public or otherwise. He therefore granted the injunction.

Sir E. Clarke, Q.C., *Cripps, Q.C.*, and *Ernest Moon*, for the defendants. The Court have a discretion on such an information as this as in other cases with regard to the granting of an injunction, and are not bound to grant it in a case like the present, where no damage to the public is shewn, but on the contrary it appears that much greater inconvenience would be occasioned to the public by enforcing the statutory condition than by allowing the existing state of things to continue. In the present case it is not shewn that under existing conditions any danger or injury to the public is occasioned by running the trains over the crossing at a greater speed than four miles an hour; and it is obvious that, if the train is obliged to slacken to four miles an hour, it will be longer in the section, and the gates will consequently have to remain closed across the highway for a longer period. There is, it must be admitted, no case directly in favour of the defendants' contention, but it is submitted that on the other hand there is no case which shews

that the Court is bound to grant an injunction in all cases where there is a breach of a statutory provision without any reference to the convenience of the case or the question whether the public is really injured or not. The observations of Lord Truro in *Attorney-General* v. *Birmingham and Oxford Junction Ry. Co.* (1) tend to the opposite conclusion. See also *Attorney-General* v. *Ely, Haddenham and Sutton Ry. Co.* (2) It is submitted that there is no distinction in this respect in point of principle between an application by the Attorney-General for an injunction to enforce the provisions of an Act of Parliament and an application by him for an injunction to prevent a nuisance to or interference with a public highway or stream, in the case of which the Court clearly has a discretion. The cases relied on for the informant, in which an injunction was granted by the Court, do not support the contention that the Court is bound to grant an injunction in every case of the breach of a statutory provision without proof of damage. In the cases of *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (3) and *Attorney-General* v. *Cockermouth Local Board* (4), the foundation of the judgment really was that the acts done in their nature necessarily tended to injure or affect the rights of the public. The decisions in *Attorney-General* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (5) and other cases of that kind depended on the consideration that the Board of Trade exercise judicial powers in regard to the opening of railways, and, they having pronounced a line unsafe or not having pronounced it safe for traffic, to run trains upon it must be presumed to be dangerous to the public. The statement of the effect of *Attorney-General* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (5) given by Jessel M.R. from his own recollection in *Attorney-General* v. *Cockermouth Local Board* (4) is not quite accurate according to the report in the *Weekly Reporter*, for it appears from that report that the information was not to prevent the company from working one line of rails, the Act of Parliament providing that there should

(1) (1851) 3 Mac. & G. 453.
(2) (1868) L. R. 6 Eq. 106.
(3) 21 Ch. D. 752.
(4) L. R. 18 Eq. 172.
(5) (1854) 2 W. R. 330.

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be two, as stated by Jessel M.R., but to prevent the company who had opened the down line with the sanction of the Board of Trade from working the up line without their sanction. The case of *Attorney-General* v. *Mid-Kent Ry. Co.* (1) turned on the consideration that the clause which the company were contravening was in the nature of a parliamentary contract, and a distinction was expressly drawn between the case of nuisance and the failure to perform a contract. It has been held that the mere fact that directors or other persons having statutory powers are acting ultra vires does not of itself form a ground which entitles the Attorney-General to interfere without proof of public mischief: see per James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (2) It is difficult to see the distinction for this purpose between the case of a body acting ultra vires and that of a body contravening a statutory prohibition such as that contained in s. 48 of the Railways Clauses Consolidation Act, 1845.

Asquith, Q.C., *Dickens, Q.C.*, and *P. Bagnall Evans* with them, for the plaintiff, were not called upon.

A. L. SMITH L.J. This is an appeal from the judgment of Bruce J. granting an injunction to restrain the defendant company from allowing their trains to cross a level crossing at a rate of speed exceeding four miles an hour. The question is whether he was right in granting that injunction. The facts are briefly these. The company had power conferred upon them to carry their railway over a turnpike road, but a fetter was imposed upon that power by s. 48 of the Railways Clauses Consolidation Act, 1845, which was incorporated by the special Act. That section provides that trains shall not be run over a level crossing adjoining a railway station, which this crossing does, at a greater rate of speed than four miles an hour. There is no doubt that the railway company in this case have been for a long time past running their trains across this highway regardless of the provisions of s. 48. The Attorney-General now takes proceedings to enforce compliance by the company with the terms of that section; and the ques-

(1) (1867) L. R. 3 Ch. 100. (2) (1879) 11 Ch. D. 449.

tion is whether he is entitled to succeed in these proceedings. By way of answer to these proceedings the company admit that they have wholly disregarded the provisions of the section, but say that what they have done is more for the benefit of the public than compliance with the provisions of the Act would have been; and, that being so, the Attorney-General has no right to the injunction which he claims. Speaking for myself, I never heard of such a thing as that persons who are indictable as being guilty of a misdemeanour in breaking a statutory obligation should put forward by way of defence that it was more for the public benefit that they should disobey than that they should obey the statute. The defendants' counsel admitted that they could produce no authority in support of their contention, but they said that there was no case which shewed that the company could not raise the suggested defence to the claim against them for an injunction, and that some decisions tended in their favour. I must say that in my opinion the authorities which have been cited are strongly against the contention of the defendants. I will refer presently to three or four of those authorities. I am not going to discuss the question whether the running of trains over the crossing at an excessive rate of speed has the effect of keeping the gates closed across the road for a shorter time than if the Act were complied with, because in my opinion it cannot be the duty of the Court, where an Act provides that trains shall only be run at a certain rate of speed over a level crossing adjoining a station, to inquire whether it is for the benefit of the public that they should be run at a greater speed than that directed by the Act. The Legislature for reasons well known to itself has enacted that at such a spot the speed shall not exceed four miles, and that is all the Court has to deal with. It was contended that the authorities shew that the Attorney-General cannot maintain his claim for an injunction, unless he can shew that there was in fact some damage occasioned to the public by the breach of the statutory obligation. There is in my opinion no authority for the suggestion that that is the law in cases where a provision made by an Act of Parliament in the interests of the public has been wilfully and advisedly broken by a company

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in its own interests; on the contrary, there is authority against it. The case of *Attorney-General* v. *Cockermouth Local Board* (1) is the first to which I will refer. That case appears to me to be a strong authority against the defendants. In giving judgment Jessel M.R. said: "In that state of the case I am of opinion that the defendants have infringed the terms of the Act of Parliament, and that, if they take the privilege at all, they can only take it subject to such terms as are imposed by the Act of Parliament. Then this is an information by the Attorney-General against a public body to enforce the terms of a public Act of Parliament. Now, if I understand the law upon the subject, it is not necessary for the Attorney-General to shew any injury at all. The Legislature is of opinion that certain acts will produce injury, and that is enough." I entirely agree. It appears to me that these observations are applicable to the present case, and are distinctly antagonistic to the defendants' contention. The next case to which I will refer is *Attorney-General* v. *Great Eastern Ry. Co.* (2), and I do so for the sake of the observations made by James L.J. in his judgment on p. 483 of the report, which shew the position in which the defendants in the present case stand. After dealing with cases in which the matter complained of is a mere matter of ultra vires, that is, where managing partners of a concern are doing something outside their charter, Act of Parliament, or deed of settlement, and the question when the Attorney-General can take proceedings in such cases, he says: "Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour, and ought to be at once stopped. In the case of *Attorney-General* v. *Great Western Ry. Co.* (3) the railway company was prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of people's lives, and they were going to disregard that prohibition, and it was no answer for them to say that the line was so safe that no mischief could arise. The company was

(1) L. R. 18 Eq. 172. (2) 11 Ch. D. 449.
(3) L. R. 7 Ch. 767.

of course restrained from this violation of an express compact with the Legislature." These observations are very apposite to this case. Similarly, in the present case it can be no answer to the complaint that the company run their trains over the crossing at a rate of more than four miles an hour in contravention of the express prohibition contained in the Act that it is more convenient for the public that they should do so. The next case to which I will refer is *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1) Fry J. began his judgment in that case by saying: "This is clearly a case in which the defendant company without any power (for their powers had come to an end) thought fit to do certain acts which undoubtedly tended in their nature to interfere with public rights, and so tended to injure the public. The question is whether, under such circumstances, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public. In my judgment he is entitled to do so and the Court is bound to attend to his interference." Apply that to the present case. Here the defendants have thought fit to do acts tending in their nature to interfere with public rights without any power, for they were only empowered to run trains over the crossing at all on condition that they should do so at a rate of speed not exceeding four miles an hour. That being so, they have no defence to the claim for an injunction. The last authority to which I will refer is the statement of Wickens V.-C. in *Attorney-General* v. *Great Western Ry. Co.* (2) He there said with regard to a portion of railway that had been opened without the sanction of the Board of Trade: "It is said however that the unsanctioned alteration is an improvement, and tends to the greater safety and advantage of the public; but in my opinion that is a matter with which we have nothing to do." So in the present case, the Legislature having prohibited the running of trains over this crossing which adjoins a railway station at a greater rate of speed than four miles an hour, the question whether it is for the benefit of the public to run trains over it at a greater speed is one with which

(1) 21 Ch. D. 752. (2) L. R. 7 Ch. 767, at p. 770.

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we in a court of law have nothing to do. For these reasons I think the appeal must be dismissed.

COLLINS L.J. I am of the same opinion. When one sees clearly what the defendants are allowed by the Act to do and what they have in fact done and claim to do, it seems to me obvious that, quite apart from any of the authorities cited, the case put forward by the defendants is unarguable. The company came into existence on certain terms, which are contained partly in the special Act, and partly in the general Act which is incorporated with it. One of the terms upon which they are permitted to cross a public highway on the level is that, where the level crossing adjoins a station, the trains shall slacken speed to a rate not exceeding four miles an hour when going over the crossing. They take the right to cross the highway on that condition, and they have no right to do so except on that condition. Apart from the statutory right so given to them, what they do in crossing the highway would be unquestionably a wrongful interference with a public highway to the public inconvenience. What the defendants in effect say in answer to the information filed by the Attorney-General is that that which they are permitted to do would, if they did it, cause a greater obstruction to the public highway than that which they are not permitted to do, but which they are doing. That answer obviously involves a fallacy. They are not permitted to cross the road at all except on the terms imposed by the Act. What they are permitted to do is to cross the road, if and only if they run their trains over the crossing at a speed not exceeding four miles an hour. They are, therefore, committing a nuisance to a highway, and are unable to defend themselves by shewing that they are performing the statutory condition upon which they are permitted to cross it. It seems to me, that being so, that it is not ad rem to invite us to discuss what the consequences might be of their performing the condition.

The counsel for the defendants endeavoured to distinguish this case from that of *Attorney-General* v. *Mid-Kent Ry. Co.* (1),

(1) L. R. 3 Ch. 100.

which was primâ facie against them, on the ground that that case depended on the existence there of a breach of a parliamentary contract. If it were necessary to seek that element here, which I do not think it is, I think that it as clearly exists in the present case as it did in that case. The only distinction is that in that case the condition was contained in a clause of the special Act, whereas here it is contained in the general Act which is incorporated with the special Act; but that cannot make any difference. The mode of legislation by incorporation of a general Act into the special Act is merely to avoid the inconvenience of having to enact clauses of this kind in each individual case. If there is a parliamentary contract in the case of such a clause in a special Act, there is equally such a contract in the present case. I agree entirely with the judgment of Bruce J. in the Court below and that given by my Lord in this Court.

VAUGHAN WILLIAMS L.J. I agree that it is clear that this appeal should fail. Speaking for myself, however, I wish to guard against being supposed to lay down any wider proposition on the subject than is necessary for the decision of this appeal. I should myself hesitate to lay down as an absolute rule that, in every case where a public body having statutory powers are doing something which is ultra vires by reason of the fact that they have not complied with some condition or term subject to which the statute granted their powers to them, the Attorney-General is entitled to an injunction ex debito justitiæ, and the Court has no discretion in the matter. The observations of Lord Truro in *Attorney-General* v. *Birmingham and Oxford Junction Ry. Co.* (1) seem to me to point to the conclusion that the proposition so widely stated would not be accurate. But in the present case I think there can be no question that the Attorney-General is entitled to the injunction for which he asks. The 48th section of the Railways Clauses Consolidation Act, 1845, expressly says that trains shall not be run over such a crossing as this at a rate of speed exceeding four miles an hour. It appears to me that the Court must

(1) 3 Mac. & G. 453, at p. 461.

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assume that the contravention of such a provision passed to prevent a public danger is in itself without more a public injury, in respect of which the Court has no discretion but to grant an injunction at the suit of the Attorney-General.

Appeal dismissed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Field, Leamington.*

Solicitor for defendant: *C. H. Mason.*

E. L.

C. A. 1899 *Nov.* 15.

[IN THE COURT OF APPEAL.]

MOXHAM AND OTHERS *v.* GRANT.

Company—Directors—Money paid out of Capital by Directors to Shareholders—Order on Directors to replace it—Right of Directors to Indemnity from Shareholders.

Directors of a company, which had not obtained the sanction of the Court to a reduction of its capital, distributed a portion of the capital amongst the shareholders with their assent, and with notice of the fact that the money so distributed was part of the capital. The company was subsequently wound up, and the liquidator obtained an order that the directors should replace the money on the ground that the payment to the shareholders was ultra vires:—

Held, that the directors were entitled to an indemnity from the shareholders.

Decision of the Divisional Court, [1899] 1 Q. B. 480, affirmed.

APPEAL from the judgment of a Divisional Court, reported [1899] 1 Q. B. 480.

The plaintiffs were directors of, and the defendant a shareholder in, Cory's Steamers, Limited, which was a company established with the object of owning shares in ships, and the whole of its capital was so invested. Amongst the ships in which the company held shares was one called the *Primrose*, the shares in which were insured. The *Primrose* was lost, and the company received from the underwriters sums amounting to 1001*l.* 9*s.* 6*d.* The directors of the company, finding that

freights were so low as to render investments in steamers unremunerative, sent round a circular to their shareholders proposing to distribute the greater part of the insurance money received by the company amongst the shareholders in proportion to the number of their respective shares, thereby effecting a reduction of the capital assets of the company. The shareholders, including the defendant, unanimously agreed to that proposal, and the money, amounting to 719*l.* 2*s.* 6*d.*, was distributed accordingly, the defendant receiving as his share 35*l.* 15*s.* At that time the company had no creditors. Subsequently the company was ordered to be wound up, and the liquidator obtained an order in a county court under s. 10 of the Companies (Winding-up) Act, 1890, declaring that the 719*l.* 2*s.* 6*d.* distributed by the directors was unlawfully paid by them to themselves and the other shareholders in reduction of the capital of the company, and ordering the directors to pay to the liquidator that sum without prejudice to the right of the directors to be recouped by the shareholders the amounts paid by the directors to them. The directors sued the defendant in the county court to recover the 35*l.* 15*s.* paid to him. The county court judge gave judgment for the plaintiffs.

On appeal by the defendant the Divisional Court (Lawrance and Channell JJ.) affirmed the judgment of the county court judge and dismissed the appeal. (1)

The defendant appealed.

Witt, *Q.C.*, and *Poley*, for the defendant. The idea that the directors may be trustees for the shareholders is incorrect, though they may be trustees for the company. The company cannot be trustee for the shareholders: *Salomon* v. *Salomon* (2), and the directors are merely servants of the company. Unless there is the relation of trustee and cestui que trust, the foundation of the judgment in the Court below fails. Even if this view is wrong, the directors are suing in their individual capacity. The money was paid to the defendant under a mistake of law, and cannot be recovered. In Lindley on Company Law, 5th ed. p. 389, it is said: "Where directors have

(1) [1899] 1 Q. B. 480. (2) [1897] A. C. 22.

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misapplied moneys of a company by improperly distributing them among the shareholders, and have been afterwards compelled to repay such moneys, the question arises whether the directors can compel the shareholders to refund the amounts they have respectively received. The circumstance that the directors made a mistake in point of law would not entitle them to relief, but perhaps a mistake of fact might." Sect. 10 of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), does not contemplate proceedings against a shareholder to obtain the repayment of moneys misapplied or retained, or in respect of misfeasance or breach of trust. That section is directed only against directors and officers of companies. But, supposing the liquidator could have recovered the money from the shareholders, he was no party to the original payment, and so would not be affected by the rule as to payments made under a mistake of law. So in the case of an executor who has paid a legatee with notice of a debt, the creditor might follow the money into the hands of the legatee, but the executor could not recover it: *Whittaker* v. *Kershaw*. (1) If an executor pays under a mistake of law to a wrong person as beneficiary, and has to replace the money, he cannot recover from the person whom he paid: *Rogers* v. *Ingham*. (2) In *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Co.* (3), which was cited for the plaintiffs in the Court below, the plaintiff was no party to the original payment; but, whenever the person who paid seeks to recover back the money he paid, the rule as to payments made under a mistake of law applies: *Blackburn and District Benefit Building Society* v. *Cunliffe, Brookes & Co.* (4) If the directors have any cause of action, it is in respect of an illegal act as to which they are joint tortfeasors with the defendant, and therefore not entitled to recover.

Meager, for the plaintiffs. There was no tort in this case to which the rule as to joint tortfeasors could apply: *Flitcroft's Case*. (5) The shareholders received the money with notice that it was capital, and the directors but for the liquidation

(1) (1890) 45 Ch. D. 320.
(2) (1876) 3 Ch. D. 351.
(3) (1875) 1 Ch. D. 682.
(4) (1885) 29 Ch. D. 902, at p. 910.
(5) (1882) 21 Ch. D. 519, at p. 527.

could have recovered it back. Their right to be indemnified in respect of that payment still exists, for the payment they have been obliged to make to the liquidator enures to the benefit of the shareholders, since the liquidator could have sued each shareholder for the amount received by him. The part of the order which reserves the right of the directors to be recouped by the shareholders follows the orders made in *In re National Funds Assurance Co.* (1) and *In re Alexandra Palace Co.* (2)

Witt, Q.C., in reply.

A. L. SMITH L.J. This is an appeal from a decision of a Divisional Court affirming the judgment of the county court judge.

The action is by directors of a company called Cory's Steamers, Limited, to recover from the defendant, who was a shareholder, 35*l.* 15*s.*, part of a sum which the plaintiffs had been compelled to pay to the liquidator of the company.

It appears that the company owned a ship called the *Primrose*, which was lost in February, 1894. The ship was insured, and the underwriters paid a sum of money in respect of the insurance, which sum was undoubtedly part of the capital of the company. Instead of putting the money in the coffers of the company as capital, it was agreed between all who were interested to divide it among the shareholders in proportion to the number of shares held by them. This was done with notice to the shareholders that they were receiving part of the capital of the company. It was not the case of shareholders receiving money of the company in ignorance that they had no right to it, for all parties knew that they were dividing capital. Everything would have been in order if proceedings had been taken in the Chancery Division, and an order had been obtained for the reduction of the capital of the company; but this was not done. Afterwards the company got into difficulties, and was wound up. The liquidator, in going into the affairs of the company, found that this money, part of the capital, had been divided up. He might have sued every one who had received any portion of it, or he might sue the directors who had

(1) (1878) 10 Ch. D. 118. (2) (1882) 21 Ch. D. 149.

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received the money and distributed it. He took the latter course, and recovered the whole amount from the directors, who now claim from the defendant the amount he received, which they have been compelled to pay to the liquidator.

It seems to me that the position of a shareholder who receives part of the capital of a company with notice is defined by Sir George Jessel M.R. in *Russell* v. *Wakefield Waterworks Co.* (1), and that he cannot say that he is not a constructive trustee for the company of the money so received. That being so, what is the rule of equity which applies in such a case as between two trustees—the directors and the shareholder?

The rule was settled long ago, but I will only refer to *Chillingworth* v. *Chambers* (2), where the matter was gone into very fully in the other branch of the Court of Appeal. I will cite a passage from my own judgment at p. 707 of the report. It is to this effect: "As between two trustees who are in pari delicto, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other." The case, which is given at p. 710 of the report, in support of that proposition is *Lingard* v. *Bromley*. (3) In this case there are two trustees, and one has had to pay money by reason of a breach of trust as to which they are in pari delicto. When once it is ascertained that the shareholder is a constructive trustee, the rule of equity as to contribution applies and is decisive of this case. I think, therefore, that on that ground the judgment of the Divisional Court was right.

I may say that I am not prepared to hold that the doctrine laid down in *Bonner* v. *Tottenham and Edmonton Building Society* (4) does not apply in the circumstances of this case. I would also add that the passage quoted from Lindley on Company Law does not deal with the case in which money is received by a shareholder with notice that the payment made to him is illegal, nor with the case in which one trustee has

(1) (1875) L. R. 20 Eq. 474, at p. 479.

(2) [1896] 1 Ch. 685.

(3) (1812) 1 V. & B. 114; 12 R. R. 195.

(4) [1899] 1 Q. B. 161.

been compelled by law to pay money and seeks contribution from a co-trustee who is in pari delicto with regard to the breach of trust that made the money recoverable.

COLLINS L.J. I am of the same opinion. When the circumstances of this case are considered, it cannot be disputed that the liquidator could have enforced his claim to recover the capital improperly distributed against the individual shareholders to the extent of the amounts that they had received. He could also enforce against the directors his claim in respect of the whole sum. That is what he has done; and we, therefore, start with these facts. The directors who distributed the money were liable, and the persons to whom it was distributed were also liable, and the former were compelled to pay the whole amount distributed. Moreover, that payment has operated in relief of the shareholders. On those facts—namely, a payment under compulsion by one of a sum of money for which another was liable, and in relief of that other—there is an implication of law that the payer has a right to be recouped by the person relieved. The answer set up, and the only one that could be set up, is that where the parties are joint tortfeasors there can be no right to indemnity or contribution. Even at common law as far back as 1834, the rule of *Merryweather* v. *Nixan* (1) was laid down by Lord Denman in *Betts* v. *Gibbins* (2) thus: "The general rule is that between wrongdoers there is neither indemnity nor contribution: the exception is, where the act is not clearly illegal in itself." I do not suppose that in the present case any one of those concerned considered there was illegality in doing that which was done. There was illegality in the sense that the act of the directors was ultra vires, but in no other sense. But it has been held over and over again that, where money is paid by a trustee in breach of trust to persons who took it knowing the payment to be a breach of trust, they and the trustee were not thereby constituted joint tortfeasors. Channell J. dealt with that point and with the line of authorities relating to it, which all proceed

(1) (1799) 8 T. R. 186; 16 R. R. 810.

(2) (1834) 2 Ad. & E. 57, at p. 74; 41 R. R. 381.

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Collins L.J.

on the ground that there is no tort and therefore that there can be no tortfeasors, and Bacon V.-C. in *Flitcroft's Case* (1) so stated the law. That is sufficient to dispose of the case; but I will deal with the point whether the shareholder can be said to be a trustee for the company. The only bearing of this is, it seems to me, as establishing that the person who received the money did so under such circumstances as made it capable of being recovered back by the liquidator. If the money were paid unearmarked, so that the liquidator could not recover it as money had and received to his use, the chain of consecution, out of which the claim to indemnity arises, would be broken, because, unless the payment is made in relief of the person from whom indemnity is claimed, the claim cannot be supported. The sum received by the defendant in this case was money which the liquidator could follow because the shareholder received it with notice, if he had known his law as he ought to have known it, that the directors had no right to pay it to him. Thus the whole chain is established, and, the payment by the directors going in relief of the shareholder, the former are entitled to indemnity. At common law and on general principles of equity the claim is good, since it is not affected by any question of the parties being joint tortfeasors.

VAUGHAN WILLIAMS L.J. I agree. In my opinion the doctrine under which one who has made a voluntary payment under a mistake of law cannot recover back the amount from the payee, which is the principle stated in the passage in Lindley on Company Law to which we have been referred, does not apply in the present case, because the money which was paid to the liquidator, and is now sought to be recovered from the defendant, was not money which was voluntarily paid, but was money paid under compulsion. In that state of things, primâ facie, the doctrine applies which may be shortly stated thus. Where two persons are equally liable to be sued for one sum, and one is sued and compelled to pay, he has a right over against the other person liable, which right will be measured by the benefit which that person has received by the

(1) 21 Ch. D. 519, at p. 527.

compulsory payment. Sometimes there is a right to indemnity, sometimes to contribution; but the principle is the same in each case. That principle this Court acted upon in *Bonner* v. *Tottenham and Edmonton Building Society* (1), and it is applicable equally in courts of common law and according to the principles of equity. It is said that principle does not apply in this case because there can be no right to indemnity between joint tortfeasors. This objection cannot be successfully urged, because the person who received the money is not a joint tortfeasor with the person who seeks to recover it back within the meaning of the rule as laid down in *Merryweather* v. *Nixan*. (2) The case before us is not one in which the parties fraudulently dealt with the money paid to the shareholders. What was done was that there was a distribution of capital of the company among the shareholders under circumstances that gave rise to the legal presumption that they were aware of the illegality of the proceeding. In my opinion that does not make them tortfeasors.

Appeal dismissed.

Solicitors for plaintiffs: *Spencer Chapman & Co., for J. R. Richards, Swansea.*

Solicitor for defendant: *F. Du Bois.*

(1) [1899] 1 Q. B. 161. (2) 8 T. R. 186; 16 R. R. 810.

A. M.

1899
Nov. 21.

In re WILTSHIRE.
Ex parte EYNON.

Bill of Sale—Consideration, Statement of—Money "Now Paid"—Promissory Note not yet Due—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

A bill of sale stated the consideration of it to be a sum of money "now paid" by the grantee to the grantor. Of the money paid by the grantee to the grantor a part was, in pursuance of a previous agreement between them, applied by the grantor to the retirement of a promissory note then current upon which the grantor and grantee were jointly and severally liable:—

Held, that as the liability, to the satisfaction of which the money was agreed to be applied, was a liability to a third person and not to the grantee, the fact that the liability was not a debt already due did not render it obligatory to set out in the bill of sale the agreement as to the application of the money, and that the consideration of the bill was not untruly stated.

APPEAL from the county court of Glamorganshire.

On September 18, 1897, a joint and several promissory note was signed by the debtor, and by one Henry Eynon as surety, in favour of Lloyd's Bank for 100*l.*, payable three months after date. The note, not being met at maturity, was renewed on December 22 for a further period of three months.

In February, 1898, the debtor borrowed a sum of 100*l.* from Eynon, and on March 9, 1898, he applied to Eynon for a further loan of 200*l.* That sum Eynon agreed to advance him conditionally upon his agreeing to apply 100*l.* in immediately retiring the promissory note then about to fall due on March 25, and upon his giving a bill of sale to secure the 100*l.* already advanced in February, and the 200*l.* then about to be advanced. On the same date a bill of sale to secure the 300*l.* was given by the debtor, and Eynon handed to him two cheques for 100*l.* each, one drawn payable to the debtor and the other payable to Lloyd's Bank, for the purpose of retiring the promissory note, which was accordingly retired on the same day. The debtor had at that time an account at Lloyd's Bank. The consideration of the bill of sale was expressed to be "the sum of 300*l.* now paid" by the grantee to the grantor.

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On April 5, 1898, the debtor became bankrupt. The trustee in bankruptcy moved in the county court for an order that the bill of sale might be declared void upon the ground, amongst others, that the consideration was not truly stated. The county court judge thought himself bound to hold, upon the authority of *Richardson* v. *Harris* (1), that the consideration was not truly stated, and he accordingly ordered the bill of sale to be set aside. Eynon appealed.

H. Reed, Q.C., and *Bailhache*, for the appellant. The Bills of Sale Act, 1878, does not require a collateral agreement between the grantee and grantor as to the application of the consideration to be set forth in the bill: *Ex parte National Mercantile Bank, In re Haynes.* (2) In that case James L.J. said (3): "The motive of the lender, as it seems to me, is no part of the consideration for the deed, though it may be a collateral inducement to him to make the advance. Suppose that, instead of there having been bills due by the grantor to the bank, there had been outstanding in the hands of some other bank bills upon which the lenders were liable, and they had said to the grantor, 'You must take up those bills.' . . . . Stipulations of that kind would be part of the bargain between the parties, but they would be no part of the consideration which is intended by the Act to be set forth." That dictum covers the present case. The case of *Richardson* v. *Harris* (1), upon which the county court judge relied, is distinguishable. There the acceptances, to the taking up of which the money was to be applied, were acceptances held, not by a third person, but by the grantee himself; and it was held that under those circumstances money used for the purpose of extinguishing the accruing liabilities could not be regarded as payment of a debt due to the grantee.

[They also referred to *In re Davies, Ex parte Equitable Investment Co.* (4), and *Ex parte Challinor, In re Rogers.* (5)]

Muir Mackenzie, and *Ivor Bowen*, for the respondent, the

(1) (1889) 22 Q. B. D. 268.
(2) (1880) 15 Ch. D. 42.
(3) 15 Ch. D. at p. 53.
(4) (1897) 4 Manson, 358.
(5) (1880) 16 Ch. D. 260.

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trustee in bankruptcy. *Richardson* v. *Harris* (1) is in point. Here, as there, there was, irrespective of the bargain under which the payment of the consideration took place, no debt already due from the grantor to the grantee in respect of this particular 100*l.* The case of *Mayer* v. *Mindlevich* (2) is very like the present. There the grantee of a bill of sale at the grantor's request accepted certain bills of exchange drawn by the grantor, which were made payable to the grantor's creditors, and were intended to secure to them the payment of a composition by the grantor. The bills of exchange being still current at the date of the bill of sale, it was held that the obligation of the grantor to reimburse the grantee the amount of his liability on the acceptances could not be described as money "then owing." Here the bill of sale ought to have stated that part of the consideration was the discharge of a liability. The cheque was to be applied to the protection of the grantee Eynon from his liability, and the case is the same as if Eynon had retained the 100*l.* and taken it to the bank himself to retire the promissory note. The cheque was not given to the debtor to do what he liked with it. It was made payable, not to his order, but to the bank. Therefore, that particular cheque cannot be regarded as a payment to the debtor at all. [He also referred to *Darlow* v. *Bland.* (3)]

Reed, Q.C., in reply. If the part of the consideration in question had been described as 100*l.* paid at the debtor's request, it would not be disputed that the consideration would have been correctly stated. And if so, it can make no difference that it was described as money paid to the debtor: *Hamlyn* v. *Betteley.* (4) The cheque in dispute was in fact a payment to the debtor, for he had an account at Lloyd's Bank, and upon his paying the cheque into the bank it would go to the credit of his account none the less because it was drawn payable to the bank itself.

WRIGHT J. I think that the county court judge mistook the effect of *Richardson* v. *Harris.* (1) In my opinion it does

(1) 22 Q. B. D. 268.
(2) (1888) 59 L. T. (N.S.) 400.
(3) [1897] 1 Q. B. 125.
(4) (1880) 5 C. P. D. 327.

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WILTSHIRE, *In re.* EYNON, *Ex parte.*

Wright J.

not govern this case. There the liability on the bills of exchange was a liability to the grantee himself, and, as the bills were current and the money was not then due, the retention by the grantee of the amount of the bills could not be treated as a payment to the grantor. Here the liability on the note was to a third person, namely, the bank; and if the money was in fact paid to the grantor for the purpose of discharging that liability, it is immaterial whether that liability was a debt due or only one accruing. As to the point that the cheque, being drawn payable to Lloyd's Bank, was not a payment to the debtor at all, it is a sufficient answer that the debtor had an account at the bank. If he had not, it may be that I should have felt compelled to hold otherwise.

CHANNELL J. I agree. I think that the case upon which the county court judge acted does not apply. The facts are that Eynon at the date of the bill of sale lent the debtor a further sum of 200*l.* upon the condition that 100*l.* of that sum should be applied in a particular way. But the agreement as to the application does not affect the loan. It is no part of the consideration. The effect of the cases seems to be this: that if by the agreement the money is to be applied in paying some one else, it does not matter whether the debt is due at the date of the bill of sale or not; but if it is to be retained by the grantee, then, in order to justify the description of the consideration as money now paid, the debt must be already due. If the agreement had been that Eynon should pay the bank, then I think that the consideration would not have been truly stated.

Judgment for the appellant.

Solicitors for appellant: *Bell, Brodrick & Gray, for Linton & Kenshole, Aberdare.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

J. F. C.

C. A.
1899
Nov. 12.

[IN THE COURT OF APPEAL.]

JONES *v.* BIERNSTEIN.

Landlord and Tenant—Distress—Goods Impounded on Premises—Man in Possession—Distress for Rent Act, 1737 (11 *Geo.* 2, *c.* 19), *s.* 10—*Practice—Appeal from County Court—Limited Leave to Appeal to Court of Appeal.*

Where goods distrained for rent by a landlord have been impounded on the premises under 11 Geo. 2, c. 19, s. 10, it is not requisite that any one on the landlord's behalf should be left in possession of the goods.

Decision of the Divisional Court, [1899] 1 Q. B. 470, affirmed.

In an appeal from a county court to a Divisional Court, leave to appeal on one point having been given by the Divisional Court, the Court of Appeal confined the argument to the point as to which leave to appeal had been given, and refused to allow the appellant to go into another point which had been raised in the county court and in the Divisional Court.

APPEAL from the decision of a Divisional Court, reported [1899] 1 Q. B. 470.

The plaintiff, the owner of a house let to one Morrisey, distrained on the premises for rent in arrear. This took place on a Wednesday, and a man was left in possession. On the following Saturday night this man left the premises, and did not return till Monday. During his absence the defendant, who was the true owner of some of the goods, distrained, entered the house, and removed his goods. The plaintiff brought an action of pound breach in the county court. The judge found that the goods had been impounded within the meaning of 11 Geo. 2, c. 19, s. 10; that the man in possession had no reasonable necessity for his absence, and that he had therefore abandoned possession; but that as he had intended to return he had not abandoned the distress, and might be considered as in constructive possession. He held, however, that real possession was necessary, and entered judgment for the defendant.

On appeal, the Divisional Court (Lawrance and Channell JJ.) treated the finding of the county court judge that the goods were impounded as a finding of fact, and decided that, there having been no abandonment of the distress, it was not neces-

sary that the bailiff's man should remain in real possession of the goods after they had been seized and impounded. Judgment was given for the plaintiff. (1)

The defendant appealed.

Schwabe, for the defendant. There were two points raised in the county court—that there had been no pound breach, and that there had been abandonment. As to the first point, before the statute 11 Geo. 2, c. 19, s. 10, it would have been necessary to remove the goods from the premises; since the statute the authorities shew that if the goods are left on the premises there must be something definite to indicate that the goods are impounded. Here nothing was done. The furniture was not removed and locked up in a room, nor was any notice put up. All that happened was that an inventory was made, and a man left in possession. When he left the goods were neither "impounded" nor "otherwise secured." The county court judge was wrong in law in holding that the goods were impounded within the meaning of the statute. That this point was taken in the county court appears by the judge's notes, and it was taken before the Divisional Court. The learned judges were wrong in not entertaining it, and in treating the finding of the county court judge as one of fact. This point, raised in both Courts below, must be open to argument in this Court.

[A. L. SMITH L.J. You have obtained leave to appeal on one point and only one, and you are confined to that point.]

As to the necessity for leaving a man in possession, it is not suggested that the distress was abandoned; but possession was abandoned, and this left the goods unprotected as between the landlord and persons other than the tenant. [He cited *Bagshawes, Limited* v. *Deacon* (2), *Bannister* v. *Hyde* (3), and *Swann* v. *Falmouth (Earl)*. (4)]

Crawford, for the plaintiff, was not called on.

A. L. SMITH L.J. The first question in this case is what is the point which has been left for our determination; and the answer is, that it is the point decided by the judgment of the

(1) [1899] 1 Q. B. 470.
(2) [1898] 2 Q. B. 173.
(3) (1860) 2 E. & E. 627.
(4) (1828) 8 B. & C. 456; 32 R. R. 441.

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A. L. Smith L.J.

Divisional Court. An actual impounding of the goods was found by the county court judge to have been made, and the judgment of the Divisional Court proceeds on that basis. The question then is whether, when the landlord has impounded goods on the premises, it is requisite that some one should be left in possession of the goods. The point only requires to be stated to supply an answer, for, where goods are in an actual pound, it is perfectly clear that it is not necessary that any one should remain in possession of them. The appeal must be dismissed.

COLLINS L.J. We have no jurisdiction in this case except as to the point on which leave to appeal has been given by the Divisional Court. Both the learned judges proceeded on the basis that the county court judge had found that the goods were actually impounded, and on that assumption their judgment must be supported.

VAUGHAN WILLIAMS L.J. I agree that, if we are limited in this case to the point upon which the learned judges of the Divisional Court gave leave to appeal, there is nothing to be argued. The mere statement of the point excludes argument upon it. I cannot say, speaking for myself, that this result is satisfactory to my mind. A great deal of the litigation of the country is conducted in the county courts. The cases so conducted may involve small amounts; but the number of cases is large, and so is the aggregate amount involved. Speaking for myself, I should hesitate before I said that because the money value in any case is small the case is unworthy to be disposed of in the Court of Appeal. I will only add that, if one looks at the notes of the county court judge, it is obvious that the point as to which the Divisional Court gave leave to appeal was not the real point raised. It may be that by force of circumstances we are prevented from considering the real point in the case; and if so, I can only say that I am sorry for it.

Appeal dismissed.

Solicitor for plaintiff: *C. J. Parker.*
Solicitor for defendant: *H. E. Tudor.*

A. M.

THE QUEEN *v.* NASH.

1899
Nov. 6.

Parliamentary and Local Government Registration — Revising Barrister— Jurisdiction — Parochial Electors' Lists — Ownership and Occupation Claims — Local Government Act, 1894 (56 *&* 57 *Vict. c.* 73) — *Registration Order*, 1895—*Forms.*

The Local Government Act, 1894, imposes upon a revising barrister the duty of revising, in counties, lists of persons entitled, in respect of their ownership of property in a parish, to vote as parochial electors only; also lists of persons claiming to have their names entered on the ownership part of the separate list of parochial electors of the parish, and lists of persons claiming to have their names entered on the separate list of parochial electors in respect of their occupation of property in the parish.

Rule nisi, obtained on behalf of the clerk of the peace and of the county council for the county of Gloucester, calling upon the revising barrister for the northern and midparliamentary divisions of the same county to shew cause why a writ of mandamus should not issue directed to him commanding him to revise the parochial electors' lists, and hear and determine the claims of persons to have their names entered in those lists in respect of the ownership and occupation of property in the same divisions, and to hold a court in that behalf.

The following facts appeared from an affidavit, on which the rule was granted, made by the clerk of the peace and county council of Gloucestershire :—

At revision courts held in September, 1899, by the revising barrister for revising the lists of voters of several parishes situate in the northern and mid parliamentary divisions of Gloucestershire, objection was taken, by one of the political agents who attended those courts, to the jurisdiction of the revising barrister to revise the following parochial electors' lists and claims, which had been sent to him for revision, under the Registration Acts, by the clerk of the peace and county council :—

(1.) Separate lists of parochial electors, being lists of persons

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entitled to vote as parochial electors only in respect of the ownership of property within the particular parish:

(2.) Lists of ownership claimants, being lists of persons claiming to be entitled to have their names entered in the separate parochial electors' list in respect of the ownership of property within the particular parish: and

(3.) Lists of claimants (parochial electors' list), being lists of persons claiming, as parochial electors only, to have their names entered in the separate parochial electors' list in respect of the occupation of property within the particular parish.

The revising barrister, after argument and upon consideration, decided that he had no jurisdiction to revise the above lists, and therefore declined to revise them. Subsequently, on an application made to him by the clerk of the peace and county council, he refused to alter his decision, and this rule was thereupon obtained.

Henry Sutton, for the Treasury, shewed cause. The Local Government Act, 1894 (56 & 57 Vict. c. 73), does not contemplate that any separate list of parochial electors should be put before the revising barrister, nor give him jurisdiction to revise any such list. The separate lists of parochial electors have to be made up in counties by the clerk of the peace after the revising barrister has completed the work of revision. Sect. 1, sub-s. 1, provides that there shall be a parish meeting for every rural parish, and a parish council for every rural parish with a population of 300 or upwards. Sect. 2, sub-s. 1, specifies the persons of whom the parish meeting shall consist. They are, the persons "referred to in this Act as parochial electors, and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." Sect. 44, sub-s. 1, provides for the formation of the register of parochial electors. "The local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall, together, form the register of the parochial electors of the parish." The "register" is that which is made up by the clerk of the peace after the lists have been revised by

the barrister; the only lists which the barrister has to consider are the lists of parliamentary voters, and of county electors under the County Electors Act, 1888 (51 & 52 Vict. c. 10). His duty, with respect to the formation of a separate list of parochial electors, is defined by sub-s. 6 of s. 44 of the Local Government Act, 1894; he has to put a mark opposite the name of any person who is entitled to vote only as a parochial elector, and the name so marked is to be printed in a separate list of parochial electors when the clerk of the peace makes up the register of parochial electors. The revising barrister was, therefore, right in declining to consider and revise the separate list of parochial electors entitled in respect of the ownership of property in the parish. Under the Registration Acts a copy of the last year's register of persons entitled to a parliamentary vote in respect of the ownership of property in the parish is sent by the clerk of the peace to the overseers, who mark the names of persons who have died or have sold their qualifying property. That copy so marked, together with the lists of persons claiming to be on that ownership list, is sent by the overseers to the clerk of the peace, and forwarded by him to the barrister for revision. There is no justification in the Act for dividing the ownership list into two portions, and sending to the barrister a separate list of parochial electors entitled in respect of the ownership of property. Where the name of a person on the ownership list of parliamentary voters has been marked by the barrister to be put into the separate list of parochial electors, that person must next year claim to be on the parliamentary ownership list, if he wishes to be put into the separate list of parochial electors again. The revising barrister was possibly mistaken in thinking that he had no power to consider and revise the lists of claimants, whether in in respect of ownership or occupation, to be on the separate list of parochial electors; but it is submitted that in strictness the claim ought to be entered in one of the lists specified in s. 44, sub-s. 1.

Macmorran, Q.C. (*Roskill,* with him), supported the rule. Where a person owns property, which would entitle him to vote for Parliament, in more than one parish of a parliamentary

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division of a county, his name would, before the passing of the Local Government Act, 1894, be retained on the ownership list in one of those parishes and struck out in the others. But by s. 44, sub-s. 4, "Nothing in this Act shall prevent a person, if duly qualified, from being registered in more than one register of parochial electors." Instead, therefore, of striking out the name in all the parishes save one, the revising barrister has, under sub-s. 6, to put a mark opposite the name signifying that it is to be transferred to the separate list of parochial electors. In the following year the ownership list of the parish is sent to the revising barrister in two parts, the first part containing the names of the persons entitled as parliamentary voters, and the second part containing the names of those entitled as parochial electors, in respect of their ownership of property in the parish. By sub-s. 8, "Such separate list shall form part of the register of parochial electors in the parish . . . . and the law relating to the register of electors shall, with the necessary modifications, apply accordingly, and the lists shall, for the purposes of this Act, be deemed to be part of such register." The separate list of parochial electors in respect of an ownership qualification is, therefore, deemed to be part of the register, and the revising barrister must revise that part of the ownership list as part of the register in the same way as he must, under the Registration Acts in force before the Act of 1894 was passed, revise the copy sent to him of the register of owners entitled as parliamentary voters only.

As to claims to be on the separate list of parochial electors in respect of the ownership of property in the parish, sub-s. 9 of s. 44 provides that "Any person may claim for the purpose of having his name entered in the parochial electors' list, and the law relating to claims to be entered in lists of voters shall apply." "The parochial electors' list" means the separate list of parochial electors. By the "Form of Precept of the Clerk of the County Council to the Overseers," given in the Registration Order, 1895, Part I. s. 2 (*d*), "the expression 'list of ownership claimants' means the list to be made by you of persons who on or before the 20th day of July next shall have claimed to vote either as parliamentary or parochial electors in respect of

an ownership qualification in your parish." The forms given of the "notice of claim to be given to overseers by claimants in respect of ownership" (Sched. I. Form No. 2) and of "the list of ownership claimants" (Sched. I. Form No. 3), make it clear that claims may be made to be entered in the ownership list as a parochial elector. As to claims to be on the separate parochial list in respect of the occupation of property in the parish, s. 44, sub-s. 9, enable such claims to be made, and Form K, No. 5 (Sched. II. of the Registration Order, 1895), gives the form in which the claim must be entered. It is clear, therefore, that all lists of claimants to be on the lists of parochial electors, whether as owners or occupiers, must be considered and revised by the barrister. If that be not so, the claimants must either be disfranchised altogether, or their claims must be admitted without any inquiry into the validity of them.

RIDLEY J. This is a matter of first impression, and of some importance. Possibly, if there was no urgency with regard to time, we might take time to consider our decision, not because we entertain doubt on the questions we have to decide, but for the purpose of putting our decision more accurately into writing. The question is whether a revising barrister has to take into his consideration and revise, first, the list of persons whose names appear on the ownership portion of the register in respect of their right to vote as parochial electors; secondly, lists of persons claiming to be placed on that portion of the register; and, thirdly, lists of persons claiming to be placed on the separate list of parochial electors of the parish in respect of the occupation of property. I am of opinion that the revising barrister must take into consideration and revise those lists. The language of s. 2 of the Local Government Act, 1894, was relied on as having a contrary effect. [The learned judge read s. 2.] I can well understand that, upon the Act of 1894 coming into force, it might be argued, upon the words of s. 2, that the revising barrister had no power to take into consideration any lists other than the lists of "the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish."

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But s. 2 must certainly be read subject to the other provisions of the Act, and having regard to those provisions it cannot, I think, be taken to have the effect contended for. In order to see whether the revising barrister has a duty to revise lists of parochial electors, s. 44 of the Act of 1894 and the Registration Order of 1895 must be considered. After the County Electors Act, 1888, came into force the revising barrister had, in a county, to revise the lists of voters for parliament and of county electors; but when, by the Local Government Act, 1894, a new franchise was given in respect of the right to vote in the election of parish councils, it became necessary that new lists should be framed in order to meet the new state of things. The list of persons entitled to vote as parochial electors in respect of the ownership of property is formed, as I understand the matter, by cutting out from the ownership list the names of persons who are entitled to be on the ownership list of that parish as parochial electors only; and the ownership list for the parish, consisting of the parliamentary portion and the parochial portion, is in that way arrived at. In the next year that ownership list is sent by the clerk of the peace to the revising barrister with the names of those persons who have died, or have sold their qualifying property, marked by the overseers. It is said that the revising barrister has not jurisdiction to revise the parochial portion of the ownership list. I am of opinion that he has. The parochial portion of the ownership list comes within s. 44, sub-ss. 6 and 8, of the Local Government Act, 1894. It is a "separate list of parochial electors," and sub-s. 8 provides that "such separate list shall form part of the register of parochial electors of the parish . . . . and the law relating to the register of electors shall, with the necessary modifications, apply accordingly, and the lists shall, for the purposes of this Act, be deemed to be part of such register." When, therefore, the parochial portion of the ownership list comes before the revising barrister, it is a part of the register; he must consider it as such, and must exercise his discretion in dealing with objections, by the overseers or others, to the names of persons on that list in the same way that he exercises his discretion with respect to the parliamentary por-

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tion. It is said that the revising barrister has no power at all to consider the parochial portion of the ownership list. Surely it is not in accordance with the general intention of the Act that such a conclusion must be drawn. In my view the Act intended to put the parochial portion on the same footing as the parliamentary portion.

As to claims of persons to be on the ownership or occupation list as parochial electors, I think the case is quite clear. Sect. 44, sub-s. 9, provides that, "any person may claim for the purpose of having his name entered in the parochial electors' list, and the law relating to claims to be entered in lists of voters shall apply." If a person does so claim, he must make his claim in the form given in the Registration Order of 1895. If he claims to be on the parochial electors' list in respect of ownership, his claim must be according to Form No. 2, Sched. I., which shews clearly in what way he is to give notice to the overseers of his claim to be on the parochial electors' list. Form No. 3, Sched. I., which gives the heading of the ownership claimants' list, also makes that clear. If he claims to be on the parochial electors' list as an occupier, Form K, No. 5, Sched. II., applies. That form gives the heading of the "List of Claimants (Parochial Electors' List)," and a note states that the form "applies to persons who claim to have their names entered in the parochial electors' list as parochial electors only," and "a copy of the claim must be entered in this form." Then the claims, whether of persons claiming as owners or as occupiers, must be put before the revising barrister, and after he has dealt with the claims the list of parochial electors is ultimately made up by the clerk of the peace or the town clerk. It is said that the only claims which the revising barrister can consider are claims to be on the general list of voters. I think the Act and forms are precise that the claim must be to be entered in the parochial electors' list only, and in the case of such a claim the law relating to claims to be entered in lists of voters applies. I therefore cannot see how the revising barrister can refuse to revise them. This rule should, in my opinion, be made absolute.

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DARLING J. I am of the same opinion. It was the clear duty of the revising barrister to revise the lists of parliamentary voters and parochial electors on the ownership list. That he did so far as the ownership list included the name of any person who was entitled to be registered in both capacities; but he thought he had no jurisdiction to revise lists of persons who were entitled, in the particular parish, to be on the ownership list as parochial electors only. I think he was wrong. What he did not revise was a portion of the old register. I think he was wrong in refusing to revise any portion of it. As to the claims, I think the question is hardly arguable. Indeed, Mr. Sutton hardly argued it when it was pointed out what consequences would follow if his contention were well founded. Having regard to s. 44, sub-s. 9, of the Local Government Act, 1894, and to the forms given in the Registration Order of 1895, it is clear, I think, that it was the duty of the revising barrister to revise the lists of claims in question.

Rule absolute.

Solicitors for prosecutor: *Field, Roscoe & Co., for E. T. Gardom, Gloucester.*

Solicitor for defendant: *The Treasury Solicitor.*

W. A.

VESTRY OF ST. MARYLEBONE *v.* SHERIFF OF LONDON.

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Nov. 21.

Sheriff—Seizure of Goods of Person liable to pay Rates—Goods "Taken in Execution"—Duty of Sheriff to pay Rates—35 Geo. 3, c. 73, s. 195.

By 35 Geo. 3, c. 73, s. 195, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the rate shall have been paid, the sheriff upon demand by the rate-collector is "directed and required in the first place" to pay the rate to the collector.

A sheriff seized under a fi. fa. the goods of a judgment debtor who was at the time liable to pay to the vestry as the rating authority of the parish a certain rate made in conformity with the Act. A demand was made on the sheriff by the rate-collector for the amount of the rate; but the sheriff, having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate.

Held, that the sheriff was liable to the vestry for the rate.

ACTION tried before Bigham J. without a jury.

The plaintiff's claim was for 18*l.* 19*s.* 3*d.*, payable by the defendant to them under and by virtue of s. 195 of 35 Geo. 3, c. 73 (1), in respect of rates due to the plaintiffs from one T. M. Bush, whose goods had been taken in execution by the defendant as sheriff of London.

On April 21, 1898, the plaintiffs made a rate (comprising a general rate and a poor-rate) under and by virtue of 35 Geo. 3, c. 73, and the Metropolis Management Act, 1855; and on

(1) By 35 Geo. 3, c. 73, s. 195, "When, and as often as, the goods, chattels, and effects of any person or persons liable to pay any rate or assessment by virtue of this Act shall be taken in execution within the limits aforesaid by any sheriff or other officer, before such rate or rates assessment or assessments shall have been paid, then the said sheriff or other officer, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is hereby directed and required in the first place to pay to such collector or collectors such rate or rates assessment or assessments so made as aforesaid, and which shall not have been paid by such person or persons, and all arrears due thereon. Provided always that nothing herein contained shall extend or be construed to extend so as to charge such sheriff or other officer with the payment of more than one year's rate, or of a larger sum of money than the value of the goods, chattels, and effects so taken in execution."

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November 24, 1898, the sum of 18*l.* 19*s.* 3*d.* was payable by the said T. M. Bush in respect of such rate. At that date, the defendant as sheriff of London was in possession of the goods, chattels, and effects of Bush, which he had seized under a writ of fi. fa.

Whilst the defendant was in possession of the goods, a written demand was made by the plaintiffs' collector upon the defendant to pay to the plaintiffs the rate then payable by Bush. The amount so demanded was less than the value of the goods seized by the defendant. On November 25, before the goods seized had been sold or removed from the premises, Bush paid to the defendant the amount of the judgment debt, and the defendant, having handed this amount to the judgment creditor, withdrew from possession of the goods without having paid the rate.

Manisty, for the plaintiffs. The local Act, 35 Geo. 3, c. 73, gives the Vestry of St. Marylebone power to raise a poor-rate, and the Metropolis Management Act, 1855, which enables them to make a general rate, provides by s. 161 that, for the purpose of levying such rate, they shall proceed in the same manner, and have the same powers, remedies, and privileges, as in levying a poor-rate. The two rates are, therefore, on the same footing, and the plaintiffs were justified in demanding the amount of both from the defendant under s. 195 of the Act of George III. The main question is whether the goods of Bush were "taken in execution." It is submitted that, when goods are seized by a sheriff under a writ of fi. fa., they are "taken in execution"; but it is unnecessary to go so far here, since these goods, although not sold by the sheriff, were taken out of his possession by the payment by Bush of the judgment debt. Such a payment is equivalent to a sale, and the money so paid is practically the proceeds of goods taken in execution: *Smith* v. *Critchfield*. (1) It is not necessary in order to constitute a taking in execution that there should be a removal of the goods from the premises.

P. Rose Innes, for the defendant. The local Act, 35 Geo. 3,

(1) (1885) 14 Q. B. D. 873.

c. 73, is no longer applicable. It is repealed by implication by the Metropolis Management Act, 1855, which regulates the levying of rates in the Metropolis. If, however, it is still extant, it only relates to poor-rate, and does not apply to the general rate raised under the powers of the Act of 1855. The rate was not due from Bush when the demand was made on the defendant by the plaintiffs' collector. The demand-note served upon Bush only required payment of the rates on November 25, and they were, therefore, not due until that day.

Goods are not "taken in execution" until they have been removed or sold by the sheriff: *In re Neil Mackenzie* (1); *In re M'Carthy* (2); *White* v. *Binstead* (3); *Cocker* v. *Musgrove* (4); *Riseley* v. *Ryle*. (5)

If "taken in execution" means the seizure and not the result of the seizure of the goods, the claim of the plaintiffs would be preferred by the local Act to that of the landlord and of everybody else. *Smith* v. *Critchfield* (6) turned on the wording of Order LVII., r. 1 (*b*), and has therefore no application to the present case.

Manisty, in reply. The cases cited are all decisions on 8 Anne, c. 14, s. 1 (c. 18 in Revised Statutes), in which the words are, "taken by virtue of any execution." No doubt the object of that statute was to protect the landlord's interest, and, therefore, the meaning of that statute as interpreted by the subsequent decisions was that goods seized by the sheriff must not be taken off the premises until the landlord's claim has been satisfied. Those cases, therefore, are not in point. Here there has been not only a seizure, but also a realization of the execution, and the case is, therefore, precisely within the decision in *Smith* v. *Critchfield*. (6)

BIGHAM J. In this case the facts are as follows: The defendant, the sheriff of London, on November 24, was in possession of certain goods of a judgment debtor which he had seized under a fi. fa. On the same day, while the defendant

(1) [1899] 2 Q. B. 567.
(2) (1881) 7 L. R. (Ir.) (Ch.) 473.
(3) (1853) 22 L. J. (C.P.) 115.
(4) (1846) 9 Q. B. 223.
(5) (1843) 11 M. & W. 16.
(6) 14 Q. B. D. 873.

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was in possession of the goods, a written demand was made by or on behalf of the plaintiffs requiring the defendant to pay to them the rates then due and unpaid by the judgment debtor. Those rates were less in amount than the value of the goods seized by the defendant. The defendant did not pay the rates so claimed, but on November 25 he received the amount of the judgment debt—a sum of money of a larger amount than the sum claimed by the plaintiffs for rates. He paid the sum which he had so received over to the execution creditor and went out of possession. By s. 195 of 35 Geo. 3, c. 73—a local Act of Parliament affecting the parish of St. Marylebone—it is provided that, "when and as often as the goods, chattels, and effects of any person or persons liable to pay any rate . . . . by virtue of this Act shall be taken in execution . . . . by any sheriff . . . . before such rate . . . . shall have been paid then the said sheriff . . . . upon demand made . . . . shall and he is hereby directed and required in the first place to pay . . . . such rate." There are, therefore, two conditions which must exist before the sheriff can be called upon to perform the obligation cast upon him by this Act. First, it must appear that he has taken in execution the goods of a person liable to pay rates; and, secondly, he must have been served with a demand for the payment of such rates. If those two conditions are shewn to exist, it is plain that the sheriff is called upon by the statute to pay the rate. Do those conditions, then, appear here? In my opinion they do. In the first place, I am clear that as soon as the rate was made the liability to pay it at once attached, and the fact that the demand-note required payment to be made by or on a certain day which was in fact later than November 24 is altogether immaterial. The liability to pay existed, although, to suit the convenience of the collector or of the ratepayer, a day had been fixed for payment later than that on which the sheriff seized. The goods seized were, therefore, the goods of a person liable to pay the rate. Then, were they taken in execution? I think that they were. The ordinary meaning of the expression "taken in execution" is that the goods have been seized by the sheriff; and, in ordinary language, a sheriff who has seized goods under a writ of fi. fa is said to

have taken them in execution. It is argued that this is not the meaning of the words "taken in execution" because the Courts have held that words of a somewhat similar character in the statute of Anne have a different meaning. The words in the statute of Anne are different to those in the statute now under consideration, and, although no doubt they have received a different interpretation and have been said to mean taken off the premises, I do not think they are any guide to the construction of this statute.

In this case the goods got out of the sheriff's possession after they had been seized, by the payment to him of the judgment debt. In my opinion that transaction has precisely the same effect as if the goods had been sold by the sheriff. No one doubts that if he had sold the goods which he had seized he would be liable to pay out of the proceeds of sale the rates which were due from the judgment debtor. I think, therefore, that, as this transaction was in effect the same as a sale of the goods, he was equally liable.

It was then argued that the Act 35 Geo. 3, c. 73, had been repealed by the Metropolis Management Act, 1855. I do not think that there is any ground for that contention. I do not find that the remedies given by the later Act are in any way inconsistent with those afforded by the Act of George III.

Then it was said that the whole of the rates demanded could not be recovered from the sheriff, because they were not all levied by virtue of the Act of George III., but part were levied under the Metropolis Management Act of 1855. I think that contention fails also, for in my opinion the Metropolis Management Act expressly incorporates the remedies given by the earlier Act for the recovery of the rates. The 161st section of the Act of 1855, which gave the overseers power to collect general rates, provides that "the said overseers shall for the purpose of levying such rates proceed in the same manner and have the same powers, remedies, and privileges as for levying money for the relief of the poor." One of the remedies or privileges is that conferred by s. 195 of the Act of George III., and I think that the words of the later Act are sufficient to give the plaintiffs the same remedy in respect of the general

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rate that they already possessed with regard to the poor-rate. In my opinion, therefore, the plaintiffs are entitled to succeed, and I give judgment for them with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Clarkson, Greenwells & Co.*
Solicitors for defendant: *W. & T. Burchell.*

A. P. P. K.

1899
Nov. 25;
Dec. 1.

RAMAGE AND ANOTHER *v.* WOMACK.

Landlord and Tenant—Lease to Trustee—Covenant by Lessee to Repair—Occupation by Cestui que Trust—Liability of Cestui que Trust for Breach of Trustee's Covenant.

A lease of a house contained a covenant by the lessee for himself and his assigns to repair, and also a declaration that the lessee held the premises in trust for the defendant. The defendant occupied the premises during the whole of the term, as it was intended by the parties that she should do, and she paid the rent. Upon the expiry of the term the premises were out of repair:—

Held, that the fact of the defendant having the beneficial interest in the lease did not, either by itself or coupled with the fact of occupation by her, create any equitable liability in her for the breach of the lessee's covenant.

TRIAL without pleadings of a preliminary point of law.

By a lease dated April 17, 1878, the trustees of the will of one Mary Murray demised two houses, 26 and 27, Portman Street, to J. S. Womack, the husband of the defendant, for a term of twenty-one years. The premises were intended by the parties to be used by the defendant, who carried on the business of a dressmaker independently of her husband, for the purposes of her business. The lease contained a covenant by the lessee, J. S. Womack, to repair, and also a declaration by him that he held the premises in trust for the defendant as part of her separate estate. The defendant occupied the premises during the whole of the term, and paid the rent, and performed the covenants of the lease so far as they were performed.

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In 1893 the lessee, Mr. Womack, died intestate, and no administration was taken out to his estate. On the expiry of the term in 1899 the premises were out of repair. The lessors then brought this action against the defendant for damages for breach of the covenant to repair, claiming that under the circumstances she was bound by the covenants in the lease. The case was ordered to be set down for trial before a judge without pleadings upon the preliminary point whether the defendant was liable under the covenants.

R. G. Glenn, for the plaintiffs. Where a lease is granted to a trustee and the cestui que trust enters and enjoys the premises, the latter is liable in equity upon the covenants, upon the ground that he is liable to indemnify his trustee, and that circuity of action is avoided by allowing the landlord to sue the cestui que trust directly. In *Clavering* v. *Westley* (1) a lease of a coal mine was granted to A., as trustee for five partners, reserving rent. The partners entered and worked the mine and took the profits. After a time the mine became unprofitable, and the lessee became insolvent. It was held by Lord Talbot that the cestuis que trust were liable in equity to pay the lessor the amount of the rent reserved for the time during which they took the profits. And in *Wright* v. *Pitt* (2), where the facts were similar, Malins V.-C. held that the lease must be treated as binding on the beneficiaries. In *Castellan* v. *Hobson* (3) the plaintiff, being the registered owner of certain shares, sold them to a jobber from whom the defendant had agreed to purchase the same number of shares, giving the name of one Banks, a man of straw, as the transferee. The company was ordered to be wound up before the transfer was registered, and while the shares still stood in the name of the plaintiff. Having been placed on the list of contributories, the plaintiff claimed from the defendant an indemnity against payment of calls. It was held by James V.-C. that, as the plaintiff had a right of indemnity against Banks, and Banks had a similar right of indemnity against the defendant,

(1) (1735) 3 P. Wms. 402. (2) (1870) L. R. 12 Eq. 408.
(3) (1870) L. R. 10 Eq. 47.

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who was the real purchaser, the defendant could not be allowed in equity to set up a want of privity between him and the plaintiff, and the plaintiff was entitled to the indemnity sought.

H. Manisty, for the defendant. The plaintiffs' contention is based on the assumption that a trustee can sue his cestui que trust to recover sums which he has been forced to pay. But that is not true. A trustee's remedy is confined to a right to indemnify himself out of the trust estate, which in the present case consisted only of the lease itself. If their contention were right, there would in every such case be two persons liable—one at law, the trustee, and one in equity, the cestui que trust. But the rule is that, where there is a remedy at law, equity will never interfere. *Clavering* v. *Westley* (1), if it is to be understood as deciding what the plaintiffs contend, must be regarded as bad law, and as overruled in *Walters* v. *Northern Coal Mining Co.* (2), where Lord Cranworth said (3): "If he (Lord Talbot) is to be taken as laying down a general proposition, that whenever a legal lessee is trustee for another, the rent becomes an equitable debt from the cestui que trust, to be recovered by a bill in this Court, I must with all respect say that is a proposition to which I cannot assent." In that case a lease of a colliery was granted to trustees for a company. The company entered into possession and worked the colliery for a time, and then during the continuance of the lease abandoned the possession and ceased to pay rent. It was held that the lessor was not entitled to any equitable relief against the company in respect of their occupation. In *Cox* v. *Bishop* (4) an agreement to take an assignment of a lease, although followed by possession on the part of the equitable assignee, was held not to be sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease. The remedy against him, if any, arising out of the fact of possession was one which must exist at law. The decision in *Wright* v. *Pitt* (5) may be supported on the ground that the

(1) 3 P. Wms. 402.
(2) (1855) 5 D. M. & G. 629.
(3) 5 D. M. & G. at p. 646.
(4) (1857) 8 D. M. & G. 815.
(5) L. R. 12 Eq. 408.

defendants in working the coal might be treated as trespassers and were liable to account as such.

Glenn, in reply. *Walters* v. *Northern Coal Mining Co.* (1) is distinguishable on the ground that there was no declaration of trust contained in the lease itself, as was the case in *Clavering* v. *Westley* (2) and in the present case.

Dec. 1. WRIGHT J. In this case the writ asks for a declaration that the defendant is bound by the covenants contained in a lease granted to her deceased husband, including a covenant to repair. It alleges a breach of the covenant to repair, and claims damages for that breach. The case was set down for trial without pleadings on the preliminary point whether the defendant is liable to the plaintiffs under the covenants contained in the lease, and came before me upon certain admitted facts. The lease in question was made on April 17, 1878, between the plaintiffs, John Ramage and G. H. Blagrove and James Murray (since deceased), trustees of a certain will of the first part, the defendant Sarah Womack, wife of J. S. Womack, of the second part, and the said J. S. Womack of the third part, and witnessed that, in consideration of 900*l.* paid by the defendant to the lessors out of her separate estate and "of the rent hereinafter reserved and of the covenants and agreements hereinafter contained on the part of the said J. S. Womack, his executors, administrators and assigns, to be paid, observed, and performed," the lessors, with the consent of the defendant, demised the premises in question to the said J. S. Womack for the term of twenty-one years from March 25, 1878, and the said J. S. Womack thereby covenanted for himself, his heirs, executors, administrators and assigns, that he and they would repair the premises. The lease also contained a declaration by J. S. Womack that he held the premises in trust for the defendant as part of her separate estate.

Mr. Womack died in 1893, intestate, and no letters of administration of his estate were taken out.

The defendant, Mrs. Womack, from the first paid the rent and did the repairs which were done.

(1) 5 D. M. & G. 629. (2) 3 P. Wms. 402.

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The only question which it is open for me to decide is whether on these materials alone, including of course any necessary inferences from the admitted facts, the plaintiffs are entitled to succeed.

There is no allegation in the writ, nor any admission of fact, that a new contract of tenancy on the terms of the lease to Mr. Womack was made, expressly or otherwise, between the plaintiffs and Mrs. Womack, or that she became executrix de son tort of her husband in respect of this lease or otherwise. In the absence of any such allegation or admission, I must consider that the plaintiffs' claim is at present based simply on the ground that Mrs. Womack always had the beneficial interest in the lease, and always occupied under it, as it was intended she should do, and paid the rent and performed the covenants which her husband or his estate was liable to pay or perform. In other words, I must take it that she neither was originally liable as lessee, unless the lease itself made her liable, nor after her husband's death became tenant on the terms of the lease. This being the case, there is no legal contract of tenancy between her and the plaintiffs, nor any contract by which she became legally bound by the covenants in the lease. Her liability, if any, must be an equitable liability depending upon her beneficial interest alone, or coupled with the fact of occupation. It seems to me to be settled by two decisions of an appellate court—*Walters* v. *Northern Coal Mining Co.* (1) and *Cox* v. *Bishop* (2)—that there is no such equitable liability, even where possession has been taken by an equitable assignee or by a cestui que trust who has agreed with his trustee to take over the lease and has entered under the agreement; and that the covenants of the trustee or assignor ordinarily bind the beneficiary or equitable assignee, so as to render him liable to an action on the covenants, only where there is a privity of contract between him and the original lessor. Nor can the equitable assignee be compelled by the landlord to take a legal assignment of the lease, although the assignee has entered and paid rent: *Moore* v. *Greg.* (3) In *Wright* v. *Pitt* (4) Malins V.-C.

(1) 5 D. M. & G. 629.
(2) 8 D. M. & G. 815.
(3) (1848) 2 De G. & Sm. 304.
(4) L. R. 12 Eq. 408.

indeed held that the equitable assignee of a mining lease must account for the royalty or share of the value of minerals got by him as if he had been tenant under the lease; but this decision cannot affect the decisions of the superior Court, and may be supported on grounds consistent with those decisions, the grant of the minerals being regarded as limited or conditional on the payment of the royalty.

Nor does it appear to me to make any difference that in the lease itself the lessee declares himself to hold the lease as trustee for his wife. He does not purport to covenant for her, but only for himself. If such a declaration has now the effect of making her liable to an action on his covenants, it must from the first have had that effect except for the fact of her coverture. But it seems plain that the intention of the deed is that his covenant and his interest in the lease is accepted as the sole security for the repairs, and this for the very reason that she could not be effectually made liable.

Nor does the principle upon which *Castellan* v. *Hobson* (1) was decided appear to help the plaintiffs' contention. None of the parties here stand in the same relation to each other as in that case, which was one of indemnity, not of covenant; and the husband in the present case could not have sued his wife. This very distinction is taken in *Cox* v. *Bishop* (2) by Turner L.J., who points out that the obligation as between the assignor and assignee to indemnify does not affect the relation between the lessor and the assignee. Moreover, in *Castellan* v. *Hobson* (1) the judgment turned on the consideration that the man of straw might be eliminated because he was a bare trustee. But in this case the husband was not a bare trustee, but was the party intended to be made liable on the covenants.

The result is that on the materials before me I am not able to say that the action can be maintained. But upon further evidence, and upon a proper claim, the plaintiffs may be able to shew that the payments of rent by Mrs. Womack since her husband's death have been made and accepted under such circumstances that the proper inference is that she herself became tenant at law on the terms of the lease: see *Buckworth* v.

(1) L. R. 10 Eq. 47. (2) 8 D. M. & G. 815.

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Simpson. (1) Or it may appear that she paid the rent or dealt with or occupied under the lease in such a way as to necessitate or justify the legal inference that she became executrix de son tort. In either of these cases she may be personally liable, though not necessarily to the same extent or in the same way.

Judgment for the defendant.

Solicitor for plaintiffs: *G. Tilling.*

Solicitors for defendant: *Maude & Tunnicliffe, for H. Dacre, Otley.*

J. F. C.

C. A.

1899

Oct. 27; *Nov.* 10.

[IN THE COURT OF APPEAL.]

In re ROBERTS.

Bankruptcy—After-acquired Property—Personal Earnings—"Property of the Bankrupt"—Trustee, Right of—Maintenance of Bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Under s. 44 of the Bankruptcy Act, 1883, which vests in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before his discharge, all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family.

R., a professional billiard player, while an undischarged bankrupt, entered into a contract with a billiard-ball manufacturing company, whereby the company agreed to supply him annually for five years, free of cost, with 2000 billiard balls of their manufacture as and when required by him; and R. agreed that he would not, during the five years, play public billiard matches (not being championship matches) other than with balls manufactured and supplied by the company; but the contract did not impose any obligation on R. to play billiards at all. The company supplied R. during his bankruptcy with balls according to the contract, intending that he might sell them and apply the proceeds to his own use:—

Held, that under s. 44 of the Bankruptcy Act, 1883, the balls belonged to the trustee in bankruptcy, the evidence shewing that they were not wanted for R.'s support even if they could be regarded as personal earnings, as to which *quære*.

Appeal from Wright J. dismissed.

APPEAL from an order made by Wright J. upon an application by the trustee in bankruptcy of John Roberts, a professional

(1) (1835) 1 C. M. & R. 834; 40 R. R. 739.

champion billiard player, for an order for an account of the number of bonzoline billiard balls received by the bankrupt on or after March 2, 1899, from the Bonzoline Manufacturing Company, Limited, under his contract with them of October 5, 1898, and for a declaration that the balls so received by him, or then in his possession, under the contract, formed part of his estate, and as such belonged to the trustee; and for an order for delivery of the balls to the trustee by the bankrupt.

Roberts was adjudicated bankrupt on April 1, 1898. On October 5, 1898, the above-mentioned contract, which was in writing, was entered into between the Bonzoline Manufacturing Company, Limited, of the one part, and Roberts of the other part, whereby it was mutually agreed as follows: "1. The company, in consideration of the agreement on the part of the said John Roberts hereinafter contained, will for a period of five years from the date hereof, subject to the determination of this agreement at the expiration of three years from the date hereof as hereinafter provided, supply the said John Roberts or his nominees annually during such period as aforesaid, free of cost, with 2000 bonzoline balls as manufactured by the company, such balls to be supplied as and when required by the said John Roberts, on his giving to the company not less than seven days' notice requiring the same." "3. In consideration of the company undertaking to supply him with such balls as aforesaid . . . . the said John Roberts hereby agrees with the company that he will not during the said period of five years, or during the said period of three years from the date hereof in the event of this agreement being determined at the expiration of such period as hereinafter provided, play any public exhibition of billiards, pyramids, or other game on a billiard table other than with bonzoline balls manufactured and supplied by the company, and that if the said John Roberts shall commit any breach of this stipulation the company shall be forthwith released from any obligation to supply the said John Roberts with balls as aforesaid. . . . ." Then followed a proviso that nothing therein contained should prevent Roberts from playing any championship match with any other balls; and a clause empowering him to determine

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the contract at the end of three years on giving not less than three calendar months' notice and paying to the company 500*l.* The contract did not contain any clause requiring Roberts to play billiards.

Under that contract Roberts received from the company on and after March 2, 1899, 2000 balls of the gross total value of 600*l.*, the intention being that he might sell them and apply the proceeds to his own use. A large number of these he had already sold, clearing a considerable sum after deducting the expenses of advertising. On May 1, 1899, subsequently to these sales and during his examination before the registrar, he gave an undertaking not to part with any more balls during the pendency of the bankruptcy proceedings. On that date he had, as he alleged, only some 70*l.* or 80*l.* worth remaining in his possession. On May 20 the trustee made the above application to Wright J. sitting in bankruptcy, for an account and delivery up of the balls received by Roberts under the contract, on the ground that the balls passed to the trustee under s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). (1) On the other hand, it was contended on behalf of Roberts that these balls were really earned by him as payment for his professional services, and were therefore personal earnings which did not pass to the trustee. In giving judgment on July 24, 1899, Wright J. held that, assuming that these balls could properly be regarded as the fruits of the bankrupt's skill as a billiard player, the sum which they would produce, and which had been estimated by the bankrupt at 450*l.* as the net value of one year's supply, was more than sufficient for the personal maintenance of the bankrupt, and he thought that substantial justice would be done by ordering him to deliver to the trustees all balls not

(1) Sect. 44 enacts that, "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars: (1.) Property held by the bankrupt on trust for any other person; (2.) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole: But it shall comprise the following particulars: (i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. . . . ."

exceeding 200*l.* in value which he had in his possession on May 1, 1899, the date on which he gave the undertaking above mentioned. The bankrupt appealed.

It appeared from the evidence given by the bankrupt during his examinations in the bankruptcy and referred to on the appeal, that he was then earning, and could continue to earn if he chose, from 2000*l.* to 3000*l.* a year from his profession.

The appeal was heard on October 27, 1899.

Tindal Atkinson, Q.C., and *F. Cooper Willis*, for the bankrupt. These billiard balls may be regarded as "salary or income" within s. 53 of the Bankruptcy Act, 1883, under which some at least may be ordered to be applied for the bankrupt's maintenance; or they may be treated as "personal earnings," which do not pass to the trustee at all: *In re Graydon.* (1) A price paid, whether in money or material, to a bankrupt for his personal services is not "property of the bankrupt" within s. 44: *In re Shine* (2); *Williams* v. *Chambers.* (3) The question arose in *Wadling* v. *Oliphant* (4), but was not decided, as the money there in question was held to be compensation to the bankrupt for breach of contract and not proceeds of his personal labour. *Chippendale* v. *Tomlinson* (5) and *Ex parte Benwell* (6) also go to shew that personal earnings do not vest in the trustee at all, but belong to the bankrupt: see also Williams on Bankruptcy, 7th ed. p. 197. These balls have been obtained by the personal exertions of the bankrupt, and, therefore, properly come under the head of "personal earnings."

Reed, Q.C., and *E. T. Holloway*, for the trustee. Sect. 44 of the Bankruptcy Act, 1883, is precise: all the after-acquired property of an undischarged bankrupt vests in his trustee, and "personal earnings" are not within the specified exceptions referred to in the section. But in practice an exception has no doubt grown up to this extent—that the bankrupt is entitled to have out of his personal earnings so much as may be reasonably required for the maintenance of himself and his family:

(1) [1896] 1 Q. B. 417.
(2) [1892] 1 Q. B. 522.
(3) (1847) 10 Q. B. 337.
(4) (1875) 1 Q. B. D. 145.
(5) (1785) Cooke's Bank. Laws, 5th ed. pp. 431–2, 8th ed. vol. i. pp. 428–9; 4 Dougl. 318.
(6) (1884) 14 Q. B. D. 301.

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Emden v. *Carte* (1); *In re Hawkins* (2); *In re Rogers* (3); *Wadling* v. *Oliphant* (4); *In re Graydon* (5); *Mercer* v. *Vans Colina*. (6) The present contention goes too far. It is not correct to say that after bankruptcy the personal earnings of the bankrupt do not pass to his trustee. The true rule is that the property of the bankrupt of every kind passes to the trustee, subject to the power of the Court to apply so much of it as is required for the maintenance of the bankrupt and his family. If the rule is as wide as is contended for, an undischarged bankrupt could not be compelled to pay any part of the proceeds of his labour to his trustee; he would never apply for his discharge, for if he did he would only get it on terms. In *Chippendale* v. *Tomlinson* (7) Buller J. proceeded on the true ground that if the assignees claimed (as they did not in that case) the personal estate acquired by the bankrupt after the bankruptcy, he must give it up: see also *Herbert* v. *Sayer*. (8)

[LINDLEY M.R. Do you say that these billiard balls are not Roberts's personal earnings?]

Yes; for he is under no obligation by the contract to play billiards, or to exert himself in any way at all. He is supplied with the balls on account of his great reputation, and thus by way of advertising the company's goods. He does not get them as personal earnings from personal labour. He receives these balls whether he plays or not.

Tindal Atkinson, Q.C., in reply. It is too late to contend that personal earnings of a bankrupt vest in his trustee under s. 44 as "property of the bankrupt." The authorities are distinct that personal earnings vest in the bankrupt, not in the trustee, and that the bankrupt can give a good title to them by assignment. The only mode by which the trustee can get any part of them is by the intervention of the Court.

Cur. adv. vult.

(1) (1881) 17 Ch. D. 768.
(2) [1892] 1 Q. B. 890, 893, 895.
(3) [1894] 1 Q. B. 425, 430.
(4) 1 Q. B. D. 145, 151–2.
(5) [1896] 1 Q. B. 417, 421.
(6) (1897) 67 L. J. (Q.B.) 424; 4 Manson, 363; see note (2), post, p. 130.
(7) Cooke's Bank. Laws, 5th ed. pp. 431–2, 8th ed. vol. i. pp. 428–9; 4 Dougl. 318.
(8) (1844) 5 Q. B. 965.

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Nov. 10. The judgment of the Court (Lindley M.R., Sir F. H. Jeune P., and Romer L.J.) was delivered by

LINDLEY M.R. Mr. Roberts, a professional billiard player, was adjudicated bankrupt in April, 1898, and on July 24, 1899, an order was made by the judge in bankruptcy for the delivery by Roberts to his trustee of certain billiard balls worth 70*l.* or 80*l.*, which Roberts had in his possession on May 1, 1899. He had acquired these under an agreement made by him, after his bankruptcy, with the Bonzoline Company, Limited, and dated October 5, 1898. The trustee claims these billiard balls under s. 44 of the Bankruptcy Act, 1883, which is as follows: [The learned judge read it, and continued:—] Mr. Roberts contends that he is entitled to retain them upon the ground that they are his personal earnings, and are therefore excepted from the operation of that section. The alleged exception is not to be found in the Act itself, but is said to be an implied exception based upon a long series of authorities and well recognised for the last hundred years. On looking into these authorities, we are of opinion that they have no application to the present case. The exception is based upon the case of *Chippendale* v. *Tomlinson*, decided in 1785 and reported in 4 Dougl. 318, and Cooke's Bankruptcy Laws, 8th ed. vol. i. p. 428, and referred to in a note in 7 East, 57. In that case a solicitor, who had become bankrupt, brought an action for professional services rendered by him after his bankruptcy. His assignees made no objection and made no claim to the money which he sought to recover, and it was held that under these circumstances the bankruptcy of the plaintiff was no bar to the action. That was the only point really decided. There are numerous subsequent authorities to the same effect, and, so far, the law seems clear. According to the report in Douglas, Lord Mansfield said, "the single question is, whether the assignees are entitled to the earnings of a bankrupt, and we are all clearly of opinion that they are not." The report in Cooke's Bankruptcy Laws runs thus: "Lord Mansfield said, the only question is, whether the assignees of a bankrupt are entitled to the profits arising from his personal labour. That the assignees cannot let out the

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bankrupt; they cannot contract for his labour." Attempts have been made to establish on the foundation of these statements the doctrine that whatever a bankrupt earns by his personal labour or ability after the bankruptcy belongs to him. *Chippendale* v. *Tomlinson* is not an authority for any such proposition, and both Buller J., and, according to a note in Douglas, Lord Mansfield also, stated that if a bankrupt acquired a large sum of money or considerable effects they would undoubtedly belong to his assignees. So also said Lord Alvanley in *Hesse* v. *Stevenson* (1), in which it was held that a patent acquired by a bankrupt after his bankruptcy passed to his assignees. Lord Alvanley's observations (2) appear to us to represent the true doctrine on this subject. [The learned judge read the passage commencing, "Next it is contended that the nature of the property" and ending, "in respect of such property by setting up his bankruptcy"; and continued:—]

It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions, if such money is required by him for his personal support and maintenance: see *Williams* v. *Chambers* (3), the pleadings in which, however, alleged promises to pay to the assignees for work done by the bankrupt. The Bankruptcy Act of 1883, like its predecessors, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt, and he must live to use his tools and acquire such property. The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do so; and the language of s. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception. This is in entire accordance with modern decisions: see *Mercer* v. *Vans Colina* (4); *In re Graydon* (5); *Wadling* v.

(1) (1803) 3 B. & P. 565.
(2) 3 B. & P. at pp. 577–8.
(3) 10 Q. B. 337.
(4) 67 L. J. (Q.B.) 424; see note (2), post, p. 130.
(5) [1896] 1 Q. B. 417.

Oliphant (1); *Emden* v. *Carte* (2); *In re Rogers.* (3) *Benwell's Case* (4) does not conflict with other cases. That case turns entirely on s. 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. Similar observations apply to *In re Shine.* (5) Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support does not belong to his trustee. No such doctrine can be maintained in face of s. 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. The exception seems to include them.

In this case, we have not to consider the right of the trustee to sue a stranger for money payable to the bankrupt, for the bankrupt has in his own possession the property ordered to be delivered up. Moreover, that property is not wanted for the bankrupt's support. He can, and does, support himself without it. Even if, therefore, the billiard balls can be regarded as obtained by the personal exertions of the bankrupt, the order for the delivery to the trustee would be quite right.

This being so, it is unnecessary to consider whether the billiard balls can be properly regarded as personal earnings. They are delivered to the bankrupt under an agreement which imposes no obligation on him to play billiards or otherwise exert himself. All he undertakes to do is not to play in public (except in genuine championship matches) with any billiard balls except those made by the Bonzoline Company. The agreement is no doubt based on the assumption that Roberts will play billiards in public; but after all, its object is to advertise the company's balls; and as Roberts need not play at

(1) 1 Q. B. D. 145.
(2) 17 Ch. D. 768.
(3) [1894] 1 Q. B. 425.
(4) 14 Q. B. D. 31.
(5) [1892] 1 Q. B. 522.

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all, or otherwise exert himself, it is not easy to see how the case could be brought within the exception even if it were wider than upon examination it turns out to be: see *Emden* v. *Carte* (1) and the other cases above referred to. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Letts Brothers; Roscoe & Hincks.*

G. I. F. C.

(1) 17 Ch. D. 768.

(2) Wright J. 1897. Dec. 11, 21.

MERCER *v.* VANS COLINA.

THIS was an interpleader issue, tried before Wright J., raising the question as to who was entitled to a sum of 258*l.* paid into Court in an action of *Tibbits* v. *Renton*. Tibbits had been adjudicated a bankrupt in 1891, and was still undischarged. The claimant, Mercer, was his trustee in bankruptcy. The other material facts and the arguments sufficiently appear in the judgment.

Muir Mackenzie, for the trustee.

F. Cooper Willis, for Vans Colina, who also claimed the fund under an assignment from the bankrupt.

Nield, for Chapman, another claimant on the fund.

Cur. adv. vult.

Dec. 21. WRIGHT J. In July, 1896, the bankrupt introduced to Renton, who was the lessee of a public-house, a buyer of the lease, and for this service he, on September 28, 1896, sued Renton, and on April 30, 1897, obtained judgment for the 258*l.*, which was paid into court. On May 1, 1897, Renton informed the trustee in bankruptcy that the judgment had been recovered. On May 6 notices were given by the trustee to the bankrupt and to Renton claiming the money for the estate; and on May 7 the trustee obtained a stop order on the money in court. Afterwards he was informed of the other two claims which are now in question. One is a claim by J. T. Chapman, based on a letter dated May 20, 1896, and written by the bankrupt to Chapman, which is in the following terms: "Referring to our last evening's conversation, I may mention that I have two clients ready and willing to put a few thousand pounds into a brewer's house, but I have a a lot of very good men waiting for a free house, and who would give a fair price. I hope you will not lose sight of this matter, as I have no doubt you will find it good business. I mentioned last evening I am willing to allow you one-half the commission the vendor pays, in consideration of which you would of course do your share of the work." The other claim is that of one Vans Colina, and it is based on a written assignment by the bankrupt of his claim against Renton. This assignment was made on April 28, 1897, two days before the trial of the action against Renton. No notice of assignment was given by either Chapman or Vans Colina to Renton, but before or during the trial of the action against Renton the latter was

fully informed of the fact and terms of Chapman's arrangement with the bankrupt.

The first question is whether, apart from the alleged assignments, the bankrupt's claim against Renton vested in the trustee in bankruptcy, either when that claim accrued or when the trustee intervened, or whether it was in the nature of mere personal earnings of the bankrupt, and so wholly or in part exempt from reclamation by the trustee. The letter to Chapman of May 20, and the other letters put in evidence, shew that this was not by any means a solitary transaction, but that the bankrupt, although not ostensibly carrying on the trade or profession of a public-house broker, was habitually endeavouring to earn money by introductions of the same kind as in this case. In so doing, he was no doubt utilising the special knowledge of public-houses and of the persons likely to be interested in them which he had acquired in his former business of a wine and spirit merchant. I think, though with much doubt, that what he did was in the nature of a trade or business, and not in the nature of merely personal labour or personal skill. "Personal and daily labour" is one of the phrases recognised in *Kitson* v. *Hardwick*, (1872) L. R. 7 C. P. 473, at p. 479, and "daily wages" and "daily labour" in *Emden* v. *Carte*, (1881) 17 Ch. D. 768. The principal circumstance leading to a different conclusion is that in this case there was not—as there was in *Elliot* v. *Clayton*, (1851) 16 Q. B. 581; *In re Rogers*, [1894] 1 Q. B. 425; and other cases—any apparent element of capital provided for the business, or any transaction in the nature of a sale; but I cannot find that a rule is anywhere laid down that the trustee cannot be entitled to anything but profit wholly or partly derived from the use of capital or from sales. The cases from *Crofton* v. *Poole*, (1830) 1 B. & Ad. 568; 35 R. R. 380, downwards seem to me to point to a limitation of "personal earnings" to something analogous, both in its character and in the nature of its remuneration, to personal daily labour—not, of course, manual or menial only. The doctrine seems to be grounded on and limited by the necessities of maintenance of the bankrupt and his family. The mere magnitude of the earnings in this case is not immaterial in this view, besides being, according to *In re Graydon*, [1896] 1 Q. B. 417, a ground for holding that the surplus beyond those necessities passes to the trustee. The trustee is willing that some allowance should be made to the bankrupt with a view to providing for those necessities, and I think that the amount of the allowance should be 80*l.*, in addition to 20*l.* received by him in cash from Vans Colina.

The next question is whether Chapman's claim is to be allowed as a charge upon the fund. If the letter of May 20, 1896, is an assignment, such as would be perfected by notice, then I think that the knowledge of it acquired by Renton during the trial was equivalent to express notice from Chapman: see *Lloyd* v. *Banks*, (1868) L. R. 3 Ch. 488. But on the face of it that letter appears to me to be not an assignment of or charge on any particular fund, existing or future, but a mere personal contract to pay money in certain events. Further, I think that it was not competent to the bankrupt to make such a prospective assignment. This would seem to follow a fortiori from *Ex parte Nichols*, (1883) 22 Ch. D. 782. Chapman's claim, therefore, so far as

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it is founded on the alleged assignment, fails.

Next, with respect to Van Colina's claim, neither Renton nor the trustee had any notice or knowledge of this assignment until the trustee perfected his own claim by notice to the bankrupt and to Renton, and by the stop order. The law on this point appears to me to be this. By virtue of s. 50, sub-s. 5, of the Act of 1883, the trustee in bankruptcy becomes the general assignee of the bankrupt's choses in action, other than "personal earnings," as and whenever they arise, subject only to rights acquired by a bonâ fide assignee for value whether with or, as was held in *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262, without notice of the bankruptcy before the trustee intervenes. If that particular assignee has not perfected his title by notice to the holder of the fund, where such notice is required, or by a stop order, the trustee as general assignee can, by intervening and claiming the fund from the bankrupt and giving notice to the holder of the fund, or by stop order if the fund is in court, perfect his title to stand first to the exclusion of the particular assignee. This seems to be involved in *In re Barr's Trusts*, (1858) 4 K. & J. 219; *In re Atkinson*, (1852) 2 D. M. & G. 140; and *Palmer* v. *Locke*, (1881) 18 Ch. D. 381, and to be in no way inconsistent with *Cohen* v. *Mitchell*. If this is so, then, as Renton had neither notice nor knowledge of Vans Colina's assignment, and Vans Colina had not obtained a stop order, the trustee by giving his notices and obtaining a stop order has obtained priority.

[The decision of the learned judge upon a further point does not require to be reported.]

Solicitors: *Murton; Johnson & Dowding; Robins & Clark.*

H. L. F.

DAVIES *v.* JENKINS. HOWIE, CLAIMANT.

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Dec. 9.

Bill of Sale—Schedule—Specific Description of Farm Stock—Statement of Consideration—Accordance with Form—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9.

A bill of sale given in consideration of a present advance is bad if it fails to contain an acknowledgment of the receipt of the money.

Where the chattels comprised in a bill of sale are of a kind which requires to be replaced from time to time by the substitution of other similar chattels, as in the case of the live stock on a farm, a more specific description of them in the schedule is necessary than in the case of chattels which do not require to be replaced with the same degree of frequency, such as the furniture of a house.

A bill of sale expressed the consideration to be a sum of money "now due and owing." In fact, part of the said sum was advanced contemporaneously with the execution of the deed. Part of the chattels comprised in the bill were described in the schedule as "Stock: 2 horses, 4 cows." There was no evidence that at the date of the bill there were any other horses or cows on the premises of the grantor:—

Held, that there was not such a specific description of the stock as to satisfy s. 4 of the Bills of Sale Act, 1882; and that the bill of sale was void on the grounds that the consideration was not truly stated, and that, as the bill omitted to acknowledge the receipt of the money then advanced, it was not in accordance with the statutory form.

APPEAL from the county court of Glamorganshire on the trial of an interpleader issue.

The defendant, Sarah Jenkins, who carried on the business of a farmer, had borrowed from James Howie at various dates prior to April 29, 1899, sums of money amounting in all to 40*l.* On April 29, 1899, it was agreed that Howie should advance her a further sum of 50*l.*, and that she should give a bill of sale of her furniture, farm stock, and farming implements, to secure the sum of 90*l.*; and, accordingly, on the same date a bill of sale was executed and the 50*l.* was advanced. In the bill of sale the consideration was stated to be "the sum of 90*l.* now due and owing." In the schedule the farm stock was described as "Stock: 2 horses, 4 cows." An execution having been levied by the plaintiff upon the goods comprised in the bill of

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sale, Howie claimed the goods, and the bailiff interpleaded. All the goods in the bill of sale were still on the farm at the date of the execution. There was no evidence that there were any other horses or cows on the farm either at the date of the bill of sale or of the levy. The county court judge held that the bill of sale was good, and the description of the stock was sufficiently specific, and gave judgment for the claimant. The plaintiff appealed.

Mallinson (*Montague Lush* with him), for the appellant. The bill of sale is void altogether, upon two grounds: First, for not being in accordance with the form in the schedule to the Bills of Sale Act, 1882, in omitting to contain an acknowledgment of the receipt of the 50*l.* then advanced. In *Thomas* v. *Kelly* (1) Lord Macnaghten says (2) that a bill of sale is certainly not in accordance with the statutory form when it departs from it "in anything which is characteristic of that form"; and the words in the form, "the receipt of which the said A.B. hereby acknowledges," are of that description. Secondly, the consideration is not truly stated. The 50*l.* fresh advance was not "now due and owing" at the date of the bill.

In any case, the bill of sale is bad as to the horses and cows, for they are not specifically described as required by s. 4 of the Act. In *Carpenter* v. *Deen* (3) it was held that the words "21 milch cows" were not a sufficiently specific description. That case is decisive of the present.

S. T. Evans, for the respondent. A bill of sale is not required to be in the exact form provided by the statute; it is enough that it is in accordance with the form. And there is no decision to the effect that in order to satisfy that rule the receipt of the money must be acknowledged in the bill. The consideration was stated with sufficient mercantile accuracy. Even if it is to be regarded as a variation, it was an immaterial one, for it was not more favourable to the grantee.

The description of the farm stock was sufficiently specific.

(1) (1888) 13 App. Cas. 506. (2) 13 App. Cas. at p. 520.
(3) (1889) 23 Q. B. D. 566.

The case of *Carpenter* v. *Deen* (1), when the judgments come to be examined, seems to have been decided partly upon grounds which are not applicable here. Cotton L.J. laid stress on the fact that there it did "not appear that there were not on the farm at the time other milch cows besides." Here it was not disputed that the horses and cows were the only ones on the farm. Fry L.J. said that for ordinary cattle, as distinguished from valuable pedigree stock, "a general description would do." He apparently went on the ground that there were two distinct places at which the cows and horses comprised in the bill were stated to be, and there was no indication as to how many were at one place and how many at the other; while Lopes L.J. dissented altogether. In the later case of *Hickley* v. *Greenwood* (2) Cave J., from the explanation that he gave of *Carpenter* v. *Deen* (1), evidently regarded it as an unsatisfactory decision. In *Davidson* v. *Carlton Bank* (3), where a schedule commenced with the words, "The whole of the chattels at present at W. Vicarage, and consisting inter alia of the following," and then, after specifying the furniture in different rooms, included the item "Study: eighteen hundred volumes of books," the Court of Appeal held that the books were sufficiently described, on the ground that the words were to be interpreted as meaning "all the books in the study being 1800 in number." It is to be observed that the use of the words "inter alia" in the heading of the schedule suggested that there were other things in the house besides those enumerated, including possibly other books in the study over and above the 1800. Having regard to the fact that, notwithstanding the presence of those words "inter alia," the Court of Appeal put the interpretation upon the schedule in that case which they did, it is difficult to avoid the conclusion that they thought *Carpenter* v. *Deen* (1) to have been wrongly decided. If they were justified in putting that construction upon the schedule in that case, then equally would the Court be justified here in construing the words "Stock: 2 horses, 4 cows," as meaning "all the stock on the farm, being 2 horses and 4 cows," and the

(1) 23 Q. B. D. 566. (2) (1890) 25 Q. B. D. 277.
(3) [1893] 1 Q. B. 82.

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description so construed would, even according to the judgment of Cotton L.J. in *Carpenter* v. *Deen* (1), be sufficient.

DARLING J. In my opinion the county court judge's decision in this case cannot be upheld. The schedule describing the "stock" as "2 horses, 4 cows" is not sufficiently specific to satisfy the statute. In *Carpenter* v. *Deen* (1) it was held that "21 milch cows" was an insufficient description. By that decision we are bound. Moreover, the cows here are not even described as milch cows. The description is therefore even less specific than in that case. As to the two horses, it follows a fortiori that their description is insufficient, for even Lopes L.J., the dissentient judge in *Carpenter* v. *Deen* (1), was of opinion that, as it was usual to describe horses by their colour, a greater degree of particularity was required in the case of horses than in that of cows. The bill of sale was therefore bad as to the horses and cows. But I am further of opinion that it was bad altogether, and upon both the grounds taken by the appellant. The consideration was, as to 50*l.*, not truly stated. That sum would not become "due and owing" until the future date specified in the bill. While, even if the bill had stated the 50*l.* to be "now paid," it would have been bad for not containing a statement that the grantor thereby acknowledged the receipt of that sum, and for consequently departing from the statutory form.

CHANNELL J. I am of the same opinion. I think we are bound by the case of *Carpenter* v. *Deen* (1) to hold that the bill of sale is bad as to the horses and the cows. Upon the question whether the description of particular chattels is sufficient, a distinction is to be drawn between those chattels which are customarily changed from time to time and replaced by the substitution of others, and those which are not. Tables and chairs in a private house are not customarily changed in that fashion, at all events not with any degree of frequency, and a very specific description of them is not required. But live stock on a farm must necessarily, in consequence of death or

(1) 23 Q. B. D. 566.

other causes, be replaced with much greater frequency, and require a more specific description. Merely to specify their number is not enough. So, too, chattels forming the stock-in-trade of a shop, such as the pictures in *Witt* v. *Banner* (1), are in the nature of things intended to be parted with and replaced with others whenever the opportunity arises. Therefore, in their case the description is especially required to be specific.

As to the other question whether the bill of sale is wholly void I have entertained some doubt. But I am inclined to agree that the consideration was not truly stated, and also that the bill was not in accordance with the form. I think that wherever part of the consideration is a present advance it is essential to the validity of the bill that it should contain an acknowledgment of the receipt of that advance.

Appeal allowed.

Solicitor for appellant: *Richard White.*

Solicitors for respondent: *Helder, Roberts & Co., for Morgan & David, Neath.*

(1) (1887) 20 Q. B. D. 114.

J. F. C.

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PULLEN *v.* ST. SAVIOUR'S UNION.

Dec. 6.

Poor-rate—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 4—*Gross Value—Artizans' Dwellings—Charge to Tenants for Cost of Lighting and Cleaning Common Stair.*

The owner of a block of artizans' dwellings, consisting of separate tenements, the access to which was by means of a common stair, let the tenements upon the terms of the tenants paying a certain weekly sum by way of rent, and also a further sum for the lighting and cleaning of the common stair :—

Held, that, for the purpose of arriving at the gross value of the tenements under the Valuation (Metropolis) Act, 1869, the sum paid for lighting and cleaning the stair must be added to the rent reserved.

CASE stated by the London Quarter Sessions on an appeal against a valuation list.

(1.) The appellant is the owner of 616 separate rateable hereditaments, being tenement properties occupied as artizans' dwellings. The assessment in question, so far as it affects thirty-two of these hereditaments, numbered 25 to 56, Pullen's Buildings, Penton Place, in the parish of St. Mary, Newington, in the St. Saviour's Union, in the county of London, forms the subject of the appeal to quarter sessions and of this case. The appellant compounds for the rates on the said hereditaments under an order made under s. 4 of 32 & 33 Vict. c. 41.

(2.) In the supplemental valuation list for the said parish made and deposited by the overseers on or about May 30, 1898, the appellant was assessed as the owner of the said thirty-two hereditaments, and he appealed against the list on the ground that he was over-assessed. Four of the said thirty-two hereditaments were let at a weekly rent of 10*s.*, and the remainder at a weekly rent of 8*s.* 6*d.*

(3.) The rents of these hereditaments were paid to and collected by one H. C. Parker, as agent for the appellant, and the said H. C. Parker was paid a commission on the rents so collected. A further sum of 6*d.* per week was paid to the said H. C. Parker by each of the tenants in respect of the cleaning, lighting, and watching of the common staircase, and

for removing dust. The persons employed in the carrying out of these services were not engaged or paid or dismissed by the appellant. If all the 616 tenements belonging to the appellant were occupied, there was a profit of about 1*l.* per week accruing to the said H. C. Parker for the said payment of 6*d.* weekly by each tenant, and any loss in respect of those services fell upon the said H. C. Parker. No portion of the said sum of 6*d.* per week reached the pocket of the appellant either directly or indirectly, save as in the 5th paragraph mentioned.

(4.) The tenements open upon the common staircase, which lies open directly without doors to the public footway.

(5.) The gas burnt for lighting the several staircases is supplied through a separate meter, through which no other gas passes, and there is no connection with the burners in the various tenements, which are supplied with gas through automatic meters, commonly called "penny-in-the-slot" meters. The gas burnt on the stairs is paid for in the following way: the gas company supplying the gas send in a bill once a quarter to the appellant for the amounts shewn to be due in respect of these and other properties, and the appellant sends the gas company a cheque for the whole amount, the said H. C. Parker merely recouping him for the gas burnt on the staircases.

(6.) Each tenant has a weekly rent-book in which the weekly payments of the rent are recorded. The said sum of 6*d.* per week has never been entered in these rent-books, nor has it ever been distrained for, nor included in the amount for which distress has been levied.

(7.) On the taking of any tenement there is no agreement in writing, but each tenant is given to understand when he goes in that he will have to pay the said sum of 6*d.* per week. The appellant cannot sue or distrain for the said 6*d.*

(8.) The overseers, in making out the said supplemental valuation list, included the said sum of 6*d.* per week as though the same were paid to the appellant as part of the rent of each of the said hereditaments, and the amount of the gross and rateable values specified in the said list is arrived at only by including the said sum of 6*d.*

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(9.) The appellant, on making his objection to the said supplemental valuation list before the assessment committee and subsequently before the court of quarter sessions, contended that the said sum of 6*d.* per week did not in point of law form part of the gross or rateable value of each of the said hereditaments within the meaning of s. 4 of the Valuation (Metropolis) Act, 1869, or at all.

(10.) The respondents contended that the said sum of 6*d.* per week was part of the rent paid for each of the said hereditaments.

The quarter sessions held the respondents' contention to be correct, and dismissed the appeal subject to this case for the opinion of the Court.

Wheeler, *Q.C.*, and *Ryde*, for the appellant. The 6*d.* per week for lighting and cleaning the common stair is no part of the rent of the tenements. Rent is the sum payable for the occupation of the premises as they are, and does not include a sum to be paid for services rendered. In *Reg.* v. *Bilston* (1), where, by the terms of a tenancy, the landlord paid the water-rate and charged it in the rent, it was held that he was not entitled for the purpose of arriving at the rateable value to deduct the amount of the water-rate from the gross rental, upon the ground that the payment of the water-rate by the landlord was not an expense necessary to maintain the premises in a condition to command the rent. "It has no more," said Cockburn C.J., "to do with keeping the premises in a condition to command the rent than a money payment for the supply of gas instead of candles." It equally follows that where such a payment has not been already included in the rent it cannot be added to it for the purpose of arriving at the gross value. In that case the question of the proper amount of the gross rental was not before the Court; but from what fell from the judges it is clear that, had it been, they would have held in favour of the present contention.

[CHANNELL J. It cannot be disputed that in the ordinary case of a repairing lease, where the tenant covenants to repair,

(1) (1865) L. R. 1 Q. B. 18.

the overseers are entitled, for the purpose of arriving at the gross value, to add to the actual rent the estimated cost of repairs. But repairs include paint. And what distinction in principle can be drawn between the cost of putting paint on and that of washing dirt off?]

The statute expressly mentions repairs as an expense to be taken into consideration, but it says nothing about the cost of cleaning. In *Reg.* v. *Lee* (1) Blackburn J. says: "If you are rating a house let furnished, you would ascertain how much was paid in respect of the furniture and the things in no way forming part of the rateable premises, and, deducting that from the rent paid for the furnished house, the remainder would be the rent given for the house itself, for which it would be rateable." But the gas supplied to a staircase and the services of the man who keeps it clean are no more part of the rateable premises than is furniture. Even if the house were let at a lump sum to include the gas, the cost of the gas must be deducted in order to arrive at the rent.

Marshall, Q.C., and *Corrie Grant*, for the respondents. The question whether the 6*d.* forms part of the rent is a question of fact, not of law, and the Court are bound by the finding of the sessions. The reserved rent plus the 6*d.* was a lump sum which was paid by the tenants to the landlord's collector, and the way in which the landlord kept his accounts is immaterial. A private arrangement between him and his collector cannot affect the question whether the sum paid by the tenants is rent or not. The providing of a light and clean staircase by the landlord was a necessary condition to the letting of the tenements.

Wheeler, Q.C., in reply.

DARLING J. I think this appeal must be dismissed. What we have to determine is the value to the landlord upon which the premises are rateable. In order to do that we must look at the language of s. 4 of the Valuation (Metropolis) Act, 1869. That section says that "gross value" means "the annual rent which a tenant might reasonably be expected . . . . to

(1) (1866) L. R. 1 Q. B. 241, at p. 253.

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Darling J.

pay . . . . if the landlord undertook to bear . . . . the expenses . . . . necessary to maintain the hereditament in a state to command that rent." What would the tenant be expected to pay here upon those conditions? It seems to me that he would be expected to pay the whole of what he in fact pays directly to the landlord, and also what he pays indirectly to him through his collector—namely, 9*s.* in the case of the majority of the tenements, and 10*s.* 6*d.* in the case of the remainder. For no tenant would take a tenement in a building of this character unless the staircase by which he has to reach his tenement is kept reasonably clean and lighted; at all events, he would not pay so high a sum as 9*s.* or 10*s.* 6*d.* Therefore I think that those sums represent the basis upon which the gross value of the premises is to be computed.

CHANNELL J. I am of the same opinion, though I do not think the case free from difficulty. I think that the weekly sum of 6*d.* is not a sum which upon the facts of this case could be distrained for, and according to the bargain between the parties is no part of the rent; at the same time, I think that it is a sum which must be taken into consideration in arriving at the rent which a tenant might reasonably be expected to pay for one of these tenements. The rent of every tenement includes as one of the elements of its value the character of the access to it. A tenement that is situate in a broad and convenient street fetches a higher rent and has a higher value than one which is situate in a narrow street or in a cul-de-sac. It does not signify that in a bargain which is in fact made between the parties the landlord chooses to split up the sum to be paid by the tenant, and say that he shall pay so much for the tenement itself and an additional sum for keeping the access to it in order. The sessions, therefore, in my opinion, were right in the conclusion at which they arrived.

Appeal dismissed.

Solicitor for appellant: *W. Bramwell Watkins.*
Solicitor for respondents: *Howard C. Jones.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Dec. 11.

THE MERSEY DOCKS AND HARBOUR BOARD, APPELLANTS; THE ASSESSMENT COMMITTEE OF BIRKENHEAD, RESPONDENTS.

Poor-rate—Rateable Value—Lairage—Exceptional Case—Structural Value—Profit-earning Capacity — Evidence of Receipts and Expenditure — Admissibility of Evidence.

The appellants, who were owners of lairages for the reception and slaughter of foreign cattle, appealed to quarter sessions against a poor-rate. The recorder found that there were no similar tenements in the neighbourhood with which a comparison could be made. He had evidence before him of structural value, and he admitted in evidence accounts shewing the receipts and expenditure of the defendants. On a case stated:—

Held, that as the ordinary test of the rental of similar properties could not be applied, and as the structural value alone would not embrace the profit-earning capacity of the premises, the evidence of receipts and expenditure was admissible and might be considered in conjunction with the structural value, and other circumstances of the case, in the determination of the gross estimated rental at which the premises should be assessed.

APPEAL from the judgment of a Divisional Court upon a case stated on an appeal, against a rate for the relief of the poor of the township of Birkenhead, to the quarter sessions for the borough of Birkenhead.

The following facts are taken from the case:—

The appellants are the owners and occupiers of certain lairages situate on the Birkenhead side of the river Mersey, a portion being known as the Woodside Lairages, and the other portion as the Wallasey Lairages.

On May 16, 1896, a rate for the relief of the poor in the township of Birkenhead was duly made.

The appellants gave notice of objection to the assessment committee of the Birkenhead Union, who made no reduction in the assessment of the Woodside Lairages, but reduced the assessment of the Wallasey Lairages. The appellants thereupon gave notice of appeal to the quarter sessions for the borough of

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Birkenhead, who adopted the figures of the gross estimated rental appearing in the rate-book, but reduced the rateable values.

The lairages are buildings of brick and wood roofed over, and used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. The premises are the only place in the neighbourhood at which foreign animals can be landed, except under penalties as provided by the Diseases of Animals Act, 1894; but there are lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places.

The premises are the part of the port of Liverpool defined as a foreign animals' wharf by an Order of the Board of Agriculture made on January 4, 1896, in pursuance of the Diseases of Animals Act, 1894.

The lairages were erected and are worked and carried on by the appellants under the provisions of their statutory powers, and not as a local authority under the Diseases of Animals Act, 1894. No local authority has been appointed under such Act in respect of the port of Liverpool. The lairages are carried on subject to the provisions of the Foreign Animals Order of 1896. The appellants under their statutory powers prescribed a schedule of charges in respect of the animals landed, and for the stallage and slaughter, house accommodation, and other matters provided.

In the course of the hearing of the appeal the respondents tendered in evidence certain accounts made up from the books of the appellants, shewing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending July 1, 1896, and the averages thereof. The appellants objected to the admission of any evidence as to the amount of receipts and expenditure; but the recorder held such evidence admissible, and admitted the evidence tendered by the respondents.

The recorder delivered the following judgment, in which the contentions of the appellants and respondents are stated:—

"This is an appeal from the rate laid on the 16th of May,

1896, in respect of the lairages at Woodside and Wallasey, which involves the determination of the amount at which those tenements ought to be assessed. The chief controversy between the parties in the appeal turns upon the principle applicable to the assessment of a tenement used for carrying on the business of a lairage, the valuations given in evidence with one or two exceptions not being made the subject of cross-examination by either side. The contention of the appellants is that the assessment should be based upon the structural value of the buildings plus the value of the land, as in the case for instance of an ordinary warehouse, whereas the respondents maintain that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage. I am of opinion that in the exceptional circumstances of this case it is not possible to ascertain what a tenant would give for the occupation of these tenements by merely considering the structural value of the buildings and the value of the land, or otherwise than by investigation of the actual average annual receipts and expenditure involved in carrying on the business of a lairage."

The recorder subsequently added the following paragraphs :—

"I did not assess the rate upon the profits of the tenant, but I used them together with other evidence to test the values given by the appellants and respondents respectively.

"Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up.

"I therefore accepted these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before me, most of which was given by the appellants.

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"As both parties desire to obtain the opinion of the High Court upon the true principle of assessment applicable and for the purpose of stating a case, I find the following facts:—

"(1.) The tenements subject to assessment are capable of separate beneficial occupation, apart from their connection with the rest of the appellants' property.

"(2.) Their value is enhanced by their proximity to and connection with the docks and rails belonging to the appellants.

"(3.) There are tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage.

"(4.) There are no similar tenements in this neighbourhood with which a comparison can be made."

The case then stated the figures which should be adopted if the assessment ought to be based on the mere structural value of the buildings plus the value of the land, and without reference to receipts and expenditure, and continued: "The appellants admit that if the principle of assessment contended for by the respondents is correct the gross estimated rentals of the two hereditaments in question appearing upon the rate-book are not too high, and the respondents admit that in this appeal they cannot be increased." Consequently the recorder adopted these figures; but as the net values were reduced the appeal was allowed.

The questions for the opinion of the Court were:—

1. Whether the accounts referred to were properly admitted.

2. Whether the principle adopted in the judgment was correct.

On the argument before the Divisional Court (Lawrance and Channell JJ.) the decision of the recorder was affirmed.

The appellants appealed.

Nov. 24. *Marshall, Q.C., Horridge,* and *Hugo Marshall,* for the appellants.

Pickford, Q.C., A. A. Tobin, and *R. M. Montgomery,* for the respondents.

[The following cases were cited: *Rex* v. *Bridgewater*

Trustees (1); *Rex* v. *Liverpool Exchange* (2); *Reg.* v. *London and South Western Ry. Co.* (3); *Reg.* v. *Abney Park Cemetery Co.* (4); *Mersey Docks* v. *Liverpool* (5); *Reg.* v. *London and North Western Ry. Co.* (6); *Reg.* v. *Verrall* (7); *Clark* v. *Fisherton-Angar* (8); *London County Council* v. *Erith* (9); *Edinburgh Street Tramways* v. *Lord Provost of Edinburgh* (10); *Cartwright* v. *Sculcoates Union.* (11)]

Cur. adv. vult.

Dec. 11. A. L. SMITH L.J. read the following judgment:—When the facts found in this case by the learned recorder of Birkenhead are understood, in my opinion the answers to be given to the questions asked of us involve no real difficulty.

The first question is whether the published accounts of the Mersey Docks and Harbour Board in relation to their receipts and expenditure in conducting the lairages of which they are occupiers were rightly received in evidence upon the hearing of the appeal at quarter sessions brought by the appellants, the Mersey Docks and Harbour Board, against an assessment of their lairages to the poor-rate; and the second is whether the principle adopted by the recorder in arriving at the rateable value of the lairages, as appears upon the special case, is correct.

The learned recorder states that he did not assess the rate upon the profits of the tenant, but that he used them, together with other evidence, to test the value given by the appellants and respondents respectively.

The material facts found by the recorder are these: First, that the lairages consist of lands and buildings in the occupation of the appellants within the ambit of the rating authority. Secondly, that the lairages are the only places in the neighbourhood at which foreign cattle can be landed, except under

(1) (1829) 9 B. & C. 68; 32 R. R. 574.
(2) (1834) 1 A. & E. 465.
(3) (1842) 1 Q. B. 558.
(4) (1873) L. R. 8 Q. B. 515.
(5) (1873) L. R. 9 Q. B. 84.
(6) (1874) L. R. 9 Q. B. 134.
(7) (1875) 1 Q. B. D. 9.
(8) (1880) 6 Q. B. D. 139.
(9) [1893] A. C. 562.
(10) [1894] A. C. 456.
(11) [1899] 1 Q. B. 667.

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penalties as provided by the Diseases of Animals Act, 1894. Thirdly, that the lairages were erected and are worked by the appellants under statutory powers which enable them to exact charges for the lairages they provide for imported animals. Fourthly, that there are no similar hereditaments in the neighbourhood with which the lairages can be compared in order to ascertain what rent a tenant from year to year would be likely to give for the lairages, and that they fall within the category of cases which in rating law are known as exceptional cases. Fifthly, that it is not possible to ascertain what rent a tenant from year to year would give for the occupation of the lairages by merely considering the structural value of the buildings and the value of the land upon which the buildings stand. And, lastly, that to ascertain what rent such a tenant would give, the actual average annual receipts and expenditure obtained and incurred in carrying on the work of the lairages must be investigated.

Now, first of all, it is manifest that the rental value of these lairages cannot be ascertained by adopting the ordinary method of ascertaining what rent the hypothetical tenant from year to year would be likely to give for the hereditament about to be assessed—namely, by comparing the hereditament with other similar hereditaments in the neighbourhood, and ascertaining what rent the other hereditaments command, and thus arriving by comparison at an approximation as to what rent a tenant from year to year would be likely to give for the hereditament in question. As this method, which is, as I have said, the ordinary method for ascertaining rateable value, cannot be adopted, some other method has to be resorted to. What, then, in such a case is the next method usually brought into play? It is to take the structural value of the buildings and the value of the land upon which they stand, and to calculate what would be the interest upon the capital sum which would have to be expended if the occupier had become the purchaser and not the tenant. For instance, if the cost of the buildings, plus the value of the land, was, say, 10,000*l.*, the interest thereon, say, at 4 per cent., being 400*l.* a year, the assumption is made that the hypothetical tenant, being desirous of occupying the

premises, not purchasing, but becoming a yearly tenant, might be willing to pay as rent a sum in some degree represented by the interest upon the money he would have had to expend, had he become a purchaser instead of a tenant. This is a method which is adopted when the comparison of the hereditament with other similar hereditaments is impracticable.

But suppose, as in the present case, in addition to the rent which a tenant might ordinarily be likely to give, there is a capacity in the hereditament itself of making a profit not personal to the tenant, but which is attached to the hereditament, why is not this capacity to be considered as an element when seeking to ascertain what the hypothetical tenant would be likely to give by way of rent? Surely a proposing tenant would take this additional element into consideration when calculating what rent he would give for the hereditament he was about to take; and why, then, is this not also to be taken into consideration by the tribunal which has to ascertain, as best it can, what rent the tenant, as a tenant from year to year, would be likely to give? There is, as it seems to me, no reason whatever why this capacity, attached to the hereditament itself, should not form an element in the consideration, and there is good authority, as I will shew in a moment, that, in such a case, this can be taken into consideration. I will take two of the cases to which our attention has been called, which sufficiently shew when a capacity of making profit cannot and when it can be taken into account. In the case of *Rex* v. *Bridgewater Trustees* (1), in the year 1829, the trustees were by statute empowered to take tolls upon the tonnage of goods passing along the Bridgewater Canal, and they in addition carried on the trade of carriers thereon, receiving freight for the goods so carried. The Court held that the tolls were to be taken into consideration when arriving at the amount at which the occupation of the trustees was to be assessed, but not the profits made by them in the carrying business, because, as Bayley J., in delivering the judgment of the Court, said: "I lay out of consideration the fact of the trustees being carriers, because their occupation only is to be considered. The profits of

(1) 9 B. & C. 68; 32 R. R. 574.

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carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them." Therefore, this tonnage profit, being attached to the land, had to be considered when arriving at the rateable value of the hereditaments—i.e. the canal. Again, in the year 1842, in the case of *Reg.* v. *London and South Western Ry. Co.* (1), it was held that the defendant company was liable to be rated for its land improved in value by the profits accruing from the railway, which in this case was held to include both the tolls and their carrying trade, because, as Lord Denman C.J. pointed out, when delivering the judgment of the Court (2), the defendants were "occupying buildings and lands on an entire line of railway, and carrying on a trade not merely therein, and thereon, but thereby." This, as it appears to me, applies to the present case. Upon this ground I think the recorder was right.

I now come to two cases which fall within the definition of exceptional cases, of which the present case is one. In the year 1875, *Reg.* v. *Verrall* (3) was decided. It was a case of rating a racecourse, an undoubted exceptional case, and it was held by Cockburn C.J. and Field J. that, in ascertaining its rateable value, the accounts shewing the receipts and expenditure in respect of the racecourse were legitimate evidence, and were clearly elements for the consideration of the justices when arriving at the value of the occupation of the racecourse. So, again, in the case in 1880 of *Clark* v. *Fisherton-Angar* (4), Field and Bowen JJ. held that, in ascertaining the rateable value of refreshment rooms upon a railway station, there being no means for a comparison, the receipts and expenditure during the past year ought to be received in evidence as an element in ascertaining the rateable value. In the case of *Dodds* v. *South Shields Union* (5) this Court approved of the last two cases, and it is clear from the report that Lord Esher must have been alluding to a case other than *Clark* v. *Fisherton-Angar* (4) when he said he did not understand it. This Court, in *Cartwright* v. *Sculcoates Union* (6), said nothing as to the accounts

(1) 1 Q. B. 558.
(2) 1 Q. B. at p. 580.
(3) 1 Q. B. D. 9.
(4) 6 Q. B. D. 139.
(5) [1895] 2 Q. B. 133.
(6) [1899] 1 Q. B. 667.

of receipts and expenditure not being received in evidence in a case like the present, and in my opinion that case has no application to a case where a profit is attached to the hereditament itself.

For the above reasons I am of opinion that in this case the accounts of the Mersey Docks and Harbour Board were rightly received in evidence by the learned recorder, and that he was right when he took evidence of the structural value of the buildings and land, and also admitted in evidence the receipts and expenditure of the lairages for the past year, each, in my judgment, being elements fit for his consideration when ascertaining as best he could what rent the hypothetical tenant from year to year would be likely to give for the lairages. He did not take the profits as the basis whereon to assess the rateable value and then add thereto the structural value, but he took evidence of the profits merely to test the values given by the appellants and respondents respectively. The point made for the appellants upon a passage in Lord Herschell's judgment in the case of *London County Council* v. *Erith* (1), in my opinion has no applicability here, because the recorder has found that there were tenants other than the Mersey Docks and Harbour Board available for the occupation of the lairages. For these reasons I think that the judgment of my brothers Lawrance and Channell must be affirmed, and this appeal dismissed.

COLLINS L.J. read the following judgment:—I am of the same opinion. I think the learned recorder has regarded both structural value and the profit-earning capacity of the hereditament in arriving at his conclusion, and I think both these elements were legitimate and indeed necessary factors in determining in this case what rent the hypothetical tenant would give for it. The profit-earning capacity of the hereditament, if it exists, must always be an important factor in the annual value, and it is just as much present in a value based on a comparison of rents fetched in the open market by similar hereditaments, where the materials for such a comparison exist,

(1) [1893] A. C. 562.

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Collins L.J.

as though it could be isolated and quantified: see the observations of Lord Watson in *Edinburgh Street Tramways* v. *Lord Provost of Edinburgh*. (1) Where there is a market rent for similar hereditaments there is no need to look for any other standard. Every element of beneficial occupation is embraced in such a rent, and therefore it would be a useless and probably misleading inquiry to examine into the profits actually made by the occupier. Such profits would depend possibly as much on the skill of the occupier as on the special facilities inherent in the hereditament itself, and a just appreciation of each element would therefore have to be made in order to make the proper deductions and so to arrive at an estimate of the rateable value—a result which has already been much more accurately ascertained by the market rent. Hence the rule that in ordinary cases where the standard of rent is applicable evidence of actual profit made cannot be received. But it is equally true that, where no such standard of comparison exists, it is legitimate to inquire into the profits actually earned: a series of cases which were referred to in argument have established this. When due allowance is made for all elements peculiar to the occupier, this is the best available means of appraising the profit-earning facilities of the hereditament itself. It is clear, therefore, that it cannot be laid down as a matter of law that profits cannot be looked at in ascertaining rateable value. The rule which excludes them in ordinary cases rests, not on the fact that the object of the inquiry is illegitimate, but that the end sought has already been reached and measured in the market rent. In the case before us there are certain profit-earning advantages linked with the occupation of the hereditament itself, and no assessment which did not embrace them would be just. It is obvious that structural value might be no measure at all, or a very imperfect measure, of the value of such advantages. The buildings and appliances might be just as costly whether the special advantages existed or not. The test of structural value, therefore, though frequently useful where the beneficial occupation does not embrace profit-earning facilities, is incom-

(1) [1894] A. C. 456, at p. 475.

plete where such facilities are the most important factor in the annual value. If a complete and satisfactory estimate of the rent which the hypothetical tenant would give could be made from an examination of the profits actually earned, there would be no need to look further or consider structural values as ex hypothesi—the rent would include all elements of value. But it is because, as already pointed out, an examination of such profits is not a complete test, but only a means and an imperfect one of arriving at a conclusion as to the true rent which the hypothetical tenant would pay, that it may be useful to apply the standard of structural value also. It is itself an element which such tenant might properly take into consideration, and it also furnishes a parallel and independent mode of checking the conclusions arrived at from an examination of profits. There is no incompatibility between them, and I think it would not be safe to omit either in the present case. I understand the learned recorder to have done no more than this; and I am of opinion, therefore, that his decision and that of the Divisional Court was right.

VAUGHAN WILLIAMS L.J. read the following judgment:— I agree that this is an exceptional case, in which you cannot apply the ordinary test consisting of comparison with the values or rentals of similar hereditaments in the district, or the mere test of structural value.

I agree with the judgment just delivered on the assumption that the finding of the recorder does not mean that, having taken the actual receipts and expenditure of the occupiers as the basis or measure of the rent which the "hypothetical tenant" would be willing to pay, he then added to the sum thus arrived at something for the structural value of the buildings and the value of the land, but means only that, having arrived at the structural value, plus the value of the land, he then took into consideration the facilities which land improved by the structures would afford for the lairage business conducted by the appellants. For if once you make the balance of receipts over expenditure, i.e., the net profits, the basis of the rent which the hypothetical tenant would be

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willing to pay, you can add nothing to the rent after applying this exhaustive measure.

It is as if having to value a man's labour, and having taken evidence of the piece-rate and the time-rate (evidence of both of which rates would clearly be admissible for the purpose of arriving at the value), you then applied the piece-rate as the measure of the value of his work, and proceeded to add something to the sum thus arrived at by taking into consideration the value as based on time-rate.

Thus, in the present case it seems to me that you cannot measure the rent which the hypothetical tenant would pay by the standards of the net profits which he would make, and then add something for structural value. You must in such a case, I think, exclude structural value from consideration altogether as an item going to make up the sum of the rent which the hypothetical tenant would be ready to pay.

The contention of the respondents as set forth in the case was that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage, and the recorder goes on to state that in his opinion, in the exceptional circumstances of this case, it is not possible to ascertain what a tenant would give for the occupation of these tenements by merely considering the structural value of the buildings, or otherwise than by investigation of the actual annual average receipts and expenditure involved in carrying on the business of a lairage. He then says: "I did not assess the rate upon the profits of the tenant, but I used them (the profits) together with other evidence (inter alia, the structural value of the buildings) to test the values given by the appellants and the respondents respectively," i.e., the value arrived at by the appellants based upon the structural value of the buildings plus the value of the land, and the value arrived at by the respondents, based upon the actual average receipts and expenditure of a lairage.

The Court is asked by question 2 to say whether the principle thus adopted by the recorder is correct.

We have not seen the figures of the items by which the recorder arrived at the net annual value on the principle of

assessment which he states was applied by him. If, however, he took as an item in the sum the balance of receipts over expenditure, and then added something for structural value, I think he was wrong.

It may be, however, that he arrived at a minimum rental value which the tenant would certainly be willing to pay, having regard to the structural value, and then added something on the ground that the evidence of the receipts and expenditure shewed that the lairages occupied by the appellants were likely to command a good business.

The case we have to consider is, in my judgment, an exceptional case, in which it is not possible to get at the rateable value in the ordinary way by calling an expert and comparing the hereditaments proposed to be rated with some hereditaments in the neighbourhood, so that it is legitimate to get at the rateable value by getting at what trade is being done and calculating what the hypothetical tenant would be likely to give for the opportunity of carrying on business there; but when you have made that calculation you have arrived at the rateable value and there is an end of the matter—you can add nothing to it.

In *Reg.* v. *Verrall* (1) and in *Clark* v. *Fisherton-Angar* (2) there was a rent from which the calculation started: in the former case the rent was said to be too low, and the fact that large profits were made was relied upon as proof that the rent was too low to represent the value. The sessions held that the books could not be called for; but the Court held the books to be admissible evidence, not as an absolute test, but as a material element in determining the value—material, that is, as I understand, as negativing the primâ facie assumption that the rent was a fair test of the value. When the case got back to sessions it might be that, the rent test being displaced, some other test might be found, and if not, the case being an exceptional case, the net profit test would be applicable as a sole test. So in *Clark* v. *Fisherton-Angar* (2), the books were put in to shew that the rent was too high, being above the value.

These cases shew that receipts and expenditure may be given

(1) 1 Q. B. D. 9. (2) 6 Q. B. D. 139.

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in evidence to shew that the value by the ordinary test applied was not satisfactory, and that the value must be enhanced or reduced, as the case might be, but to my mind shew nothing more.

Both cases relate rather to the admissibility of the evidence than to the ultimate measure to be applied.

As to the first question, I have no doubt but that the evidence of the receipts and expenditure was admissible.

Appeal dismissed.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for A. T. Squarey, Liverpool.*

Solicitors for respondents: *J. E. & H. Scott, for Thompson, Hughes & Mathison, Birkenhead.*

A. M.

Distinguished. *Re* EARL FITZWILLIAM'S AGREEMENT. [1950] 1 All E.R. 191.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* CLARKSON.

Revenue—"*Settlement Estate Duty*"—*Contingent Settlement*—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 1 (*h*), (*i*)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 4—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

Settled estate duty is, under s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, payable in respect of property only contingently settled, though, under s. 14 of the Finance Act, 1898, the duty will, if the contingency does not and cannot arise, be repaid.

Sect. 14 of the Finance Act, 1898, amounts to an adoption by the Legislature of the construction which was put upon s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, in *Attorney-General* v. *Fairley*, [1897] 1 Q. B. 698.

APPEAL against a decision of a Divisional Court (Wills and Bruce JJ.).

The question was whether settlement estate duty was payable under s. 5 of the Finance Act, 1894, in respect of property contingently settled by a will.

John Peter Robinson, by his will dated February 25, 1891, bequeathed to Kate Alice Eagle an annuity of 3000*l.* during her

life, or until she should marry, to commence from his decease, and, in the event of her marrying, a reduced annuity of 500*l.* during the remainder of her life. He bequeathed to his three sons, J. P. Robinson, M. J. Robinson, and D. C. Robinson, the sum of 30,000*l.* apiece, to be paid to them respectively if and when they respectively should attain the age of twenty-five, with interest in the meantime at the rate of 3 per cent. per annum to be computed from his decease, and to be paid during their respective minorities to their respective guardians or guardian. And, in case either of his said sons should die under the age of twenty-five leaving issue, then the testator bequeathed unto his trustees the legacy of his son so dying, to be held in trust for all or every his children or child who should be living at his decease, and who being sons or a son should attain the age of twenty-one, or being daughters or a daughter should attain that age or marry under it, and, if more than one, in equal shares. But in case either of his said sons should die under twenty-five without leaving issue, then the testator directed that the legacy of him so dying should sink into and form part of his residuary personal estate and not be payable. The testator devised and bequeathed his residuary real and personal estate to the use of four trustees, their heirs, executors, and administrators respectively, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by his will, including the legacies of 30,000*l.* to his three sons (if and when payable), and to invest the residue of the proceeds in the names of his trustees as therein directed, and to hold the said residuary moneys and the stocks, &c., from time to time representing the same, upon trust out of the income thereof to pay to Kate Alice Eagle the said annuity of 3000*l.* or 500*l.* as the case might be, and also to pay or apply the yearly sum of 200*l.* to or for the maintenance, education, or benefit of each of his seven children or reputed children then living by Kate Alice Eagle (being three sons and four daughters, whose names were stated) until such children respectively being male should attain the age of twenty-five years, and being female should attain that age or marry. And, subject to the

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payment of the said annuity and yearly sums of 200*l.*, his trustees should hold the said residuary moneys, stocks, &c., and the accumulations of income thereof, under a trust for accumulation thereinafter contained, in trust for such of his said children or reputed children by Kate Alice Eagle as being male should attain the age of twenty-five years, and being female should attain that age or marry, in equal shares as tenants in common. The testator directed that, during the suspense of absolute vesting of the expectant or presumptive share of any such child of his, the trustees should accumulate the surplus (if any) of the income of such share, after paying the yearly sum of 200*l.* to or for the benefit of such child, in augmentation of the share from which the same should have proceeded. But he directed that the accumulation should cease at the end of twenty-one years after his death: Provided always that the share in the trust premises thereinbefore expressed to be given to any of his said children who was a daughter should not vest absolutely in such daughter, but should be retained by his trustees, upon trust that they should during the life of such daughter pay the income of her said share to her for her separate use without power of anticipation. And from and after the decease of each such daughter, upon trusts for the benefit of her children or remoter issue similar to the trusts of an ordinary marriage settlement. If any daughter of the testator should die in his lifetime leaving issue living at his death, then her share was to be held upon the same trusts as if she had died immediately after him, so far as the same should be capable of taking effect. If any of his said children being a son should die in his lifetime leaving a child or children living at the testator's death, then his share should be held in trust for all or any his children or child who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares. And if there should be no such child the said share should go and accrue by way of addition to the share or shares of the others or other of his said children in the trust premises, if more than one in equal shares and proportions, and so that the share which should so accrue and be added to the share of any

daughter of his should be held upon the trusts therein declared concerning her original share, or as near thereto as circumstances would admit. And the testator declared that, in case of the failure or determination of all the trusts thereinbefore declared and contained as to the whole or any part of the trust premises and the income thereof, his trustees should hold the trust premises and the income thereof, or so much thereof as to which the trusts should so fail or determine, in trust for his statutory next of kin as therein mentioned.

The testator died on October 31, 1895.

The sons J. P. Robinson and M. J. Robinson attained twenty-five in the lifetime of the testator, and they both survived him. The son D. C. Robinson attained twenty-five on August 28, 1897.

Of the testator's seven children by Mrs. Eagle one (a son) died before the testator under twenty-five. The other six survived the testator. They were all under twenty-five at the time of his death, and were still under twenty-five when this appeal was heard. One of the daughters married on July 8, 1896, and she had had one child.

The Commissioners of Inland Revenue claimed from the trustees and executors of the testator's will payment, under s. 5 of the Finance Act, 1894, of settled estate duty in respect of the principal value of the testator's residuary estate (including the sums required for the payment of the contingent legacy of 30,000*l.* to D. C. Robinson and of the annuity of 3000*l.* to Mrs. Eagle).

The trustees and executors resisted the claim, and this information was brought by the Attorney-General against them to enforce the claim.

The Divisional Court, following (without any argument) the decision of another Divisional Court in *Attorney-General* v. *Fairley* (1) that settled estate duty is payable under s. 5 upon property contingently settled, even though the contingency may never arise, held that the duty must be paid as claimed by the commissioners.

The defendants appealed.

(1) [1897] 1 Q. B. 698.

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Haldane, Q.C., and *Danckwerts*, for the defendants. The Divisional Court simply followed *Attorney-General* v. *Fairley* (1), and the question now raised is whether that decision was right.

The question depends upon the construction of s. 5 (2), sub-s. 1, of the Finance Act, 1894, in conjunction with s. 22, sub-s. 1 (*h*), (*i*); s. 2, sub-ss. 1, 4, of the Settled Land Act, 1882; and s. 14 of the Finance Act, 1898. In the present case the only settlement made by the testator's will was a contingent settlement. The gifts to his children were made only on the happening of a contingency—the attainment of twenty-five or marriage. In order that settlement estate duty should be payable, there must be an instrument by virtue of which property "stands for the time being limited to or in trust for any persons by way of succession." There must therefore be an existing settlement at the time of the testator's death; a settlement

(1) [1897] 1 Q. B. 698.

(2) By s. 5, sub-s. 1, of the Finance Act, 1894, "Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—

"(*a*) A further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased."

By s. 22, sub-s. 1 (*h*), "The expression 'settled property' means property comprised in a settlement."

"(*i*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section."

By s. 2, sub-s. 1, of the Settled Land Act, 1882, "Any deed, will, ... or other instrument . . . . under or by virtue of which instrument . . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement."

"(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect."

By the Finance Act, 1898, s. 14, "Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shewn that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

which would not come into existence until the happening of a contingency and might never come into existence is not sufficient.

[LINDLEY M.R. Your argument is that "settled" does not include "liable to become settled."]

That is the precise point.

There is no limitation here to persons "by way of succession" within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882. There cannot be a "succession" to a person who himself takes nothing: *In re De Hoghton* (1); *In re Pocock and Prankerd's Contract.* (2) Sect. 58, sub-s. 2, of the Settled Land Act, 1882, does not apply here, as it did in that case and *In re Morgan.* (3) Sect. 2 must be taken as a whole, and sub-s. 4 shews that regard must be had to the time when the will takes effect, i.e., at the death of the testator. If the property is not settled at that time the duty in question is not payable. There must be a present existing settlement at the date of the testator's death; a possible settlement, dependent on the happening of a contingency which may or may not happen, will not do.

These limitations might possibly have constituted a settlement within the meaning of the Leases and Sales of Settled Estates Acts: *In re Burdin's Will* (4); *In re Goodwin's Settled Estates* (5); *In re Shepheard's Settled Estate* (6); *In re Birtle's Settled Estates* (7); *Collett* v. *Collett* (8); but the words "for the time being" did not occur in those Acts. At any rate, the annuity of 3000*l.* was not settled; it is clearly charged on corpus: *Attorney-General* v. *Owen* (9); *In re Mundy and Roper's Contract* (10); *Earl Cowley* v. *Inland Revenue Commissioners.* (11)

How can there be in such a case a limitation "by way of succession," when, in case the corpus should be exhausted, there would be nothing to succeed to?

(1) [1896] 1 Ch. 855, 864.
(2) [1896] 1 Ch. 302.
(3) (1883) 24 Ch. D. 114.
(4) (1859) 28 L. J. (Ch.) 840.
(5) (1862) 3 Giff. 620.
(6) (1869) L. R. 8 Eq. 571.
(7) (1863) 11 W. R. 739.
(8) (1866) L. R. 2 Eq. 203.
(9) [1899] 2 Q. B. 253.
(10) [1899] 1 Ch. 275.
(11) [1899] A. C. 198.

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The Finance Act does not say who is to pay this duty. This point was dealt with by North J. in *In re Webber* (1), though the executor is by s. 6, sub-s. 2, made accountable for "estate duty" in respect of all personal property. A taxing statute ought to be construed strictly against the Crown.

Sect. 14 of the Finance Act, 1898, has no application to the present case, and it does not amount to an adoption by the Legislature of the construction which was put upon s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, in *Attorney-General* v. *Fairley*. (2) The Act of 1898 was passed in consequence of *Attorney-General* v. *Fairley* (2) to remedy what was thought to be a hardship. Sect. 14 does not say that settlement estate duty shall be payable in the case of a contingent settlement; it only says that, when the duty has been paid in such a case, it shall be refunded if the contingency does not and cannot happen.

Sir R. B. Finlay, S.-G., and *Vaughan Hawkins*, for the commissioners. Sect. 14 of the Finance Act, 1898, is in effect an adoption by the Legislature of the construction put upon s. 5 of the Finance Act, 1894, in *Attorney-General* v. *Fairley*. (2) If this testator had died after the Act of 1898 came into operation, it would have been impossible to argue that settlement estate duty was not payable. How can the construction of s. 5 be different according as the death takes place before or after the Act of 1898 came into operation?

[They were stopped by the Court.]

LINDLEY M.R. The question we have to decide is one of some difficulty, but I think the argument for the appellants, ingenious as it is, is not conclusive, and in my opinion it is not really open to us to accede to it. The real and the only question we have to consider, although it involves an investigation into other matters, is this: Whether the property in respect of which settlement estate duty is claimed, that is the residuary estate of the testator, was settled by his will. That is what we have to consider and to determine. If it is, then by sub-s. 1 (*a*) of s. 5 of the Finance Act, 1894, "a further estate duty (called settlement estate duty) on the principal

(1) [1896] 1 Ch. 914, 921. (2) [1897] 1 Q.B. 698.

value of the settled property shall be levied at the rate hereinafter specified," with an exception which does not apply here.

Now, looking at the will, I cannot possibly say that in ordinary conveyancer's language this residuary estate is not "settled" by it. In ordinary language it certainly is. But it has been argued very forcibly that we must see whether the property was settled by the will on any persons "by way of succession" when the will came into operation, that is, at the death of the testator, and that is got at by turning to s. 22 of the Finance Act and s. 2 of the Settled Land Act, which contains a definition of "settlement" and of "settled land."

Having listened to that argument, I will admit for the present that it raises a very nice question—whether this property can be regarded as governed by sub-s. 4 of s. 2 of the Settled Land Act. I am not convinced that it can, but, if it can, then we must consider whether it can be regarded as settled on "any persons by way of succession."

A Divisional Court has already decided in *Attorney-General* v. *Fairley* (1) that, upon the true construction of s. 5, sub-s. 1 (*a*), of the Finance Act, having regard to s. 22, and also to s. 2 of the Settled Land Act, settlement estate duty is payable in respect of property limited as this residue is, and we are asked to overrule that decision. I am by no means convinced that the appellants would have induced us to overrule it, even if the subsequent Finance Act of 1898 had not been passed. I will concede that the point is an exceedingly nice one and by no means free from difficulty, but, as we have not heard the respondents about it, I will say no more.

But, admitting the difficulty, it appears to me that s. 14 of the Act of 1898 concludes the question. It is true that that section does not apply to this particular case, because the testator died in 1895, and s. 14 applies only "in the case of a death occurring after the commencement of the Act." But the section, as it seems to me, recognises the construction which was put upon s. 5 of the Finance Act, 1894, in *Attorney-General* v. *Fairley* (1), and makes the present

(1) [1897] 1 Q. B. 698.

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contention quite untenable. Sect. 14 says: "Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shewn that the contingency has not arisen and cannot arise, the said duty paid in respect of such property shall be repaid." Consider what that means. It affirms in substance the decision in *Attorney-General* v. *Fairley* (1), and proceeds upon the assumption that it was right. It adopts the construction put by it upon s. 5 and the sections of the Act of 1882 which are incorporated in the Act of 1894, and says in unmistakable language that the duty must be paid before it is known whether the contingency will or will not arise. If you have a property settled on a contingency you must pay the duty, and if you can afterwards satisfy us that the contingency has not arisen and cannot arise, then we will repay the duty. Well, then, if that is the construction of s. 5 which has been adopted by Parliament, how can we say that it was wrong when this testator died in 1895, and is right after the Act of 1898? It is impossible for us to do that. It appears to me that s. 14 of the Act of 1898 is a parliamentary adoption of the construction put by the Court on s. 5 of the Act of 1894. The Legislature found that that construction might work oppressively, because there was no provision for restoring the money, which, in the event which was proved to have happened, ought not to have been taken from the taxpayer, and they said, "We will take the money at once, and, if it so happens that it ought not to have been paid, we will refund it." It is easy to understand the reason for that, because, if the Inland Revenue Commissioners did not get the money at once, they would never know afterwards whether the contingency had or had not happened. In the face of s. 14, it appears to me that we cannot give effect to the doubt which the appellants' counsel have raised as to the meaning of the word "settled." I do not say that we should not have arrived at the same conclusion without the Act of 1898, but, with that Act before us, it is not possible to adopt their argument.

(1) [1897] 1 Q. B. 698.

SIR F. H. JEUNE. I am of the same opinion. Without the Act of 1898 I should have had great doubt whether the decision in *Attorney-General* v. *Fairley* (1) was right. I was much impressed by the argument of Mr. Haldane, and by that of Mr. Danckwerts, upon the use of the words "by way of succession." But, having regard to that Act, it seems to me that it is impossible for us to take any other view of the construction of s. 5 than that which, in my opinion, the Legislature have imposed upon us. Our duty is to interpret the meaning of the Legislature, and if the Legislature in one Act have used language which is admittedly ambiguous, and in a subsequent Act have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the Legislature have acted as their own interpreters of the earlier Act. That being so, I have no doubt that our present decision must be in accordance with that of the Divisional Court in *Attorney-General* v. *Fairley*. (1)

ROMER L.J. I need only add that I agree with the judgment of the Master of the Rolls.

Danckwerts. The 30,000*l*. given to the son D. C. Robinson belonged to him absolutely when he attained twenty-five.

ROMER L.J. It was at the date of the testator's death contingently settled.

Sir R. B. Finlay, S.-G. It was contingently settled within *Attorney-General* v. *Fairley*. (1) That decision covers the present case.

ROMER L.J. Yes, it does.

Appeal dismissed.

Solicitors: *Caprons, Dalton, Hitchins & Brabant; Solicitor to Inland Revenue.*

(1) [1897] 1 Q. B. 698.

W. L. C.

C. A.
1899
Dec. 16.

[IN THE COURT OF APPEAL.]

LONDON AND WESTMINSTER BANK, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp—Scrip Certificate—Payment by Instalments—Receipts for Future Payments indorsed on Certificate—Stamp Act, 1891 (54 & 55 *Vict. c.* 39)—*Schedule*, "*Receipt*," *Exemption* 11.

A scrip certificate duly stamped stated that the bearer was entitled to 100*l.* stock of the Cape of Good Hope after payment of two several sums of 40*l.* at specified dates. Receipts were indorsed on the certificate applicable to the payment of the two instalments at the specified dates:—

Held, affirming the judgment of a Divisional Court, that the receipts acknowledged the receipt of the consideration money expressed in the certificate on which they were indorsed, and were exempt from duty under title "Receipts," Exemption 11, in the schedule to the Stamp Act, 1891.

APPEAL from the judgment of a Divisional Court in favour of the appellants, on a case stated by the Commissioners of Inland Revenue.

On May 10, 1899, two receipts, partly in print and partly in writing, appearing upon the face of a scrip certificate of the Cape of Good Hope Consolidated 3 per cent. Stock, were presented by the appellants to the Commissioners of Inland Revenue for the opinion of the commissioners as to the stamp duty with which they were respectively chargeable.

The scrip certificate and the receipts respectively were in the following form:—

"Cape of Good Hope Consolidated 3 per cent. Stock.

"Issue of 3,107,400*l.*

"No. 8920. 100*l.*

"Scrip Certificate for One Hundred Pounds.

"The bearer of this scrip certificate is entitled to one hundred pounds Cape of Good Hope Consolidated 3 per cent. Stock, 1933–1943—after payment to the London and Westminster Bank, Limited, Lothbury, of the instalments due thereon as

under, namely:—40*l.* on the 10th April, 1899. 40*l.* on the 10th May, 1899.

"Payment in full may be made at any time, under discount at the rate of 2 per cent. per annum. If default be made in payment of the amounts at their due dates, the previous payments will be liable to forfeiture.

"This scrip certificate, when fully paid, must be lodged at the London and Westminster Bank, Limited, Lothbury, for inscription in the books of the 'Cape of Good Hope Consolidated 3 per cent. Stock, 1933-1943,' in such name or names (not exceeding four) as may be desired. The interest on the stock will be payable at the London and Westminster Bank, Limited, on the 1st February and 1st August in each year, and the principal will be repayable there on the 1st February, 1943, the Government of the Cape of Good Hope having the option to redeem the stock at par on or after the 1st February, 1933, on giving twelve calendar months' notice to the stockholders. Six months' interest on the stock will be paid on the 1st August, 1899.

"The revenues of the Colony of the Cape of Good Hope alone are liable in respect of this stock and the dividends thereon, and the Consolidated Fund of the United Kingdom and the Commissioners of Her Majesty's Treasury are not directly or indirectly liable or responsible for the payment of the stock or of the dividends thereon, or for any matter relating thereto.—40 & 41 Vict. c. 59, s. 19.

"For the London and Westminster Bank, Limited,
"London, 14th March, 1899. "J. A. Baker."

"Received the 10th day of April, 1899, forty pounds, being the instalment on the above scrip certificate, due 10th April, 1899.

"For the London and Westminster Bank, Limited,
"J. L. Ovington."

"Received the 10th day of May, 1899, payment in full.

"For the London and Westminster Bank, Limited,
"H. E. Billinge."

The scrip certificate was duly stamped as such with the duty

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of one penny, and the appellants contended that by reason of the exemption numbered 11 under the head "Receipt" in Sched. I. to the Stamp Act, 1891, the receipts were exempt from duty.

The commissioners being of opinion that the exemption was not applicable assessed each of the receipts with the duty of one penny. They have accordingly been stamped with that amount.

The question for the opinion of the Court was whether the receipts, or either of them, were chargeable with the duty of one penny in accordance with the assessment of the commissioners.

The Divisional Court (Day and Lawrance JJ.) gave judgment for the appellants.

The commissioners appealed.

Dec. 6. *The Solicitor-General* (*Sir R. B. Finlay*) and *Danckwerts*, for the Crown. The receipts fall within s. 3, sub-s. 2, which enacts, "If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable." They do not come within exemption 11 under the heading "Receipt," which exempts "Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest or annuity thereby secured or therein mentioned." The consideration for the issue of the scrip certificate was the first payment, and the holder of the certificate acquired the further right on payment of the two sums of 40*l.* to receive 100*l.* stock. The "consideration" mentioned in the exemption must be the consideration for the instrument already stamped, in this case the certificate. The subsequent payments are the consideration for the issue of the stock to the holder of the certificate. It is said the receipts fall within the description "receipt of any principal money thereby secured or therein mentioned"; but this clause of the exemption points to cases where money has been lent or an

annuity granted, and not to such a case as this, which would be properly described as an option to obtain stock.

McIntyre (*Joseph Walton*, *Q.C.*, with him), for the appellants. There is a conditional sale of 100*l.* stock if the purchaser pays the two sums of 40*l.* each at the specified dates. He is not merely to have the certificate as a piece of paper. The consideration is that which he is to give for that to which he is entitled under the terms of the certificate, and it is "therein," that is in the certificate, "expressed." Further, the "principal money" is identified by the certificate as 100*l.* stock repayable in 1943.

Cur. adv. vult.

Dec. 16. The judgment of the Court (A. L. Smith, Collins, and Vaughan Williams L.JJ.) was read by

COLLINS L.J. This is an appeal by the Crown from the decision of Day and Lawrance JJ. allowing an appeal from the commissioners. The question is whether certain receipts indorsed on a scrip certificate for 100*l.* Cape of Good Hope Consolidated 3 per cent. Stock are liable to a duty of one penny each under the Stamp Act, 1891, first schedule, or whether they fall within the exemption (11).

The scrip certificate, so far as material, is in these terms: "The bearer of this scrip certificate is entitled to 100*l.* Cape of Good Hope Consolidated 3 per cent. Stock, 1933–1943, after payment to the London and Westminster Bank, Limited, of the instalments due thereon as under, namely, 40*l.* on April 10, 1899; 40*l.* on May 10, 1899. If default be made in payment of the amounts at their due dates, the previous payments will be liable to forfeiture."

The receipts are for the payments of 40*l.* each made on the dates mentioned in the certificate.

The following is the provision of the Stamp Act, 1891, Sched. I.: "Receipt given for or upon payment of money amounting to 2*l.* or upwards, 1*d.*" Exemption 11 is as follows: "Receipt indorsed or otherwise written upon, or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein

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Collins L.J.

expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned."

The scrip certificate had been duly stamped as such, and on the date of its issue the first instalment, a sum under 20*l.*, had been paid in respect of it.

We are of opinion that the decision of the Divisional Court was right. The scrip certificate is duly stamped, and the receipts are respectively indorsed or otherwise written upon it. Therefore, if they "acknowledge the receipt of the consideration money therein expressed," they fall within the exemption. What then is meant by the "consideration money therein expressed" of which the receipt is to be acknowledged? We think it is the money which it appears from the terms of the instrument is the consideration for the obligation undertaken by the issuer of the instrument—i.e., the Government of the colony. It is in return for the payment, not of one, but of all the instalments, that the Government undertakes this obligation, and it can make no difference whether the consideration is paid in a lump sum, or by instalments, or with conditions of forfeiture on non-payment of an instalment or not. Neither is it material that the instrument can be transferred pending the payment of the instalments, so that each may be paid by a different person. The money consideration is the same by whomsoever it is paid, and whatever may be the conditions to which it is made subject. The point made by the Crown in the Court below, that the scrip certificate is not "an instrument" within the exemption, was not taken before us; but it was argued by the Solicitor-General that the consideration for the certificate was not the sums of 40*l.*, or either of them mentioned in the receipts, but the first instalment paid on the issuing of the certificate. We think, with deference, that there is a fallacy in this argument, in that it confounds that which is payable as a condition precedent to getting the custody of the certificate with that which is expressed in the certificate as the consideration, not for the handing over of the certificate with the inchoate rights arising therefrom, but for the acceptance of the final obligation which is only assumed when all the instalments are paid. Is the consideration expressed in an

instrument as the total sum in return for which the obligation is accepted any the less the consideration because it is made payable by instalments, and the custody of the instrument is handed over in exchange for the first instalment? In our opinion the receipts on this instrument acknowledge the payment of the full sum, in return for which, by the terms of the instrument, the Cape Government undertake to treat the holder as entitled to 100*l.* Cape of Good Hope Consolidated 3 per cent. Stock. The Crown also relied upon s. 3, sub-s. 2, which enacts that "if more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable"; but this only applies if the instruments do not fall within exemption 11 above set out. We cannot say whether our reasons coincide with those of the Divisional Court, for they have given none; but on the grounds above stated, we are of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Travers Smith, Braithwaite & Robinson.*

Solicitor for Crown: *The Solicitor of Inland Revenue.*

A. M.

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1899
Dec. 6.

[IN THE COURT OF APPEAL.]

SWAYNE, APPELLANT *v.* THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp Duty—"Conveyance or Transfer on Sale"—Assignment of Leaseholds—Consideration—Rent—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 57, *Sched. I.*

The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned and conveyed two of the houses, in consideration of 503*l.*, for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, and to keep the assignor indemnified in respect of it, and the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, and to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—

Held, that, for the purpose of fixing the ad valorem duty chargeable under the heading "Conveyance or Transfer on Sale of any Property" in Sched. I. of the Stamp Act, 1891, the payment of rent by the assignee was not part of the consideration for the assignment, and that duty was chargeable upon the 503*l.* only.

Decision of the Divisional Court, [1899] 1 Q. B. 335, affirmed.

APPEAL from the judgment of a Divisional Court, reported [1899] 1 Q. B. 335, in favour of the appellant on a case stated by the Commissioners of Inland Revenue, on appeal from their decision with respect to the stamp duty with which an instrument, presented by the appellant to them for their opinion, was chargeable.

By an indenture of lease of October 16, 1893, one Rowell demised to one Mills a parcel of ground and three dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of 3*l.* 16*s.* 6*d.*, and by the said indenture Mills covenanted to complete the three houses and expend on the building of each of such houses the sum of 100*l.* at the least, and he also entered into numerous other stringent covenants such as are often inserted in what are known as building leases. The three houses were erected, and were numbered 6, 7, and 8, Bowden Hill Terrace. Rowell, by

another indenture of lease bearing date March 10, 1894, demised to Mills a parcel of ground and two dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of 2*l.* 11*s.* The covenants in this indenture were similar to the covenants in the indenture of October 16, 1893. The two houses were erected, and were numbered 9 and 10, Bowden Hill Terrace. By an indenture bearing date December 27, 1897, made between Mills of the one part and Annie Penelope Swayne (the appellant) of the other part, Mills, in consideration of the sum of 503*l.* to him paid by the said A. P. Swayne, assigned and conveyed unto the said A. P. Swayne—first, the two houses 7 and 8, Bowden Hill Terrace, being two of the three houses demised by the indenture of October 16, 1893; and, secondly, the two houses 9 and 10, Bowden Hill Terrace, being the two houses demised by the indenture of March 10, 1894, to hold the same unto the said A. P. Swayne for the residue then unexpired of the said several terms of ninety-nine years, subject as to the hereditaments firstly thereinbefore described to the apportioned yearly rent of 2*l.* 11*s.*, part of the yearly rent of 3*l.* 16*s.* 6*d.* reserved by the indenture of October 16, 1893, and to the observance and performance of the covenants and conditions therein contained, and subject as to the hereditaments secondly thereinbefore described to the payment of the yearly rent of 2*l.* 11*s.* reserved by the indenture of March 10, 1894, and to the observance and performance of the covenants and conditions therein contained, A. P. Swayne covenanted with Mills to pay the several sums of 2*l.* 11*s.* and to observe and perform the covenants and conditions in the said leases to Mills respectively contained, and to keep Mills indemnified; and Mills covenanted with A. P. Swayne to pay the apportioned rent of 1*l.* 5*s.* 6*d.*, the residue of the rent reserved by the indenture of October 16, 1893, and to keep the said A. P. Swayne indemnified in respect thereof.

This indenture was the instrument in respect of which the opinion of the commissioners was asked.

The commissioners were of opinion that the instrument fell to be charged under the head "Conveyance on Sale" in the 1st

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schedule to the Stamp Act, 1891. In accordance with their practice they did not assess duty upon the capitalised value of the yearly rent of 2*l.* 11*s.* payable in respect of the houses numbered 9 and 10, Bowden Hill Terrace. They were of opinion, however, that duty was chargeable upon the rent of the same amount payable in respect of the houses 7 and 8, Bowden Hill Terrace, and they assessed duty upon the said sum multiplied by 20, under s. 56, sub-s. 2, of the same Act. (1) They also assessed duty upon the sum of 503*l.*, the premium payable under the instrument, which was stamped in accordance with their assessment.

The appellant being dissatisfied with the assessment so far as it related to the houses 7 and 8, Bowden Hill Terrace, required the commissioners to state a case.

The questions for the opinion of the Court were :—

1. Whether the instrument was chargeable with the duty in accordance with the assessment of the commissioners.

2. If not, with what duty the instrument was chargeable.

The Divisional Court (Wills and Bruce JJ.) gave judgment for the appellant. (2)

The commissioners appealed.

Sir R. B. Finlay, S.-G., and *Danckwerts*, for the commissioners. A case in which the parties to a transfer enter into a

(1) By 54 & 55 Vict. c. 39, Sched. I., ad valorem duty is set forth in respect of "Conveyance or transfer on sale of any property" (except certain stock) dependent on "the amount or value of the consideration for the sale."

Sect. 56, sub-s. 2: "Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years . . . . the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

Sect. 57: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."

(2) [1899] 1 Q. B. 335.

convention as to payments to be made by the transferee is different from a case in which the transferee has to make payments inherent to the property transferred. The express covenant entered into by the appellant as to the payments in respect of numbers 7 and 8 was part of the consideration for the assignment of the term, and the amount of those payments was properly taken into consideration in assessing the duty chargeable under the Act.

[They referred to *Inland Revenue Commissioners* v. *City of Glasgow Bank Liquidators* (1) and *Wolveridge* v. *Steward.* (2)]

Vaughan Hawkins, for the appellant, was not heard.

A. L. SMITH L.J. I am of opinion that this appeal fails, and I entirely agree with the judgment delivered by my brother Bruce.

The case is that Mills was lessee of five houses in Bowden Hill Terrace, numbered from 6 to 10. He agreed to sell and did sell to the appellant four of these houses, 7, 8, 9, and 10. The two last carried a rental of 2*l.* 11*s.*; the three first, 6, 7, and 8, a rental of 3*l.* 16*s.* 6*d.*; but inasmuch as of these 7 and 8 only were assigned to the appellant, there was an apportionment of rent, and it is admitted that it was a proper apportionment. The apportionment was that as regarded 7 and 8 the rental should be 2*l.* 11*s.*, which tallies exactly with the rental of 9 and 10.

The question is, what stamp duty does the assignment to the appellant carry? The commissioners say that as regards 9 and 10 the rental is not to be taken into account in estimating the duty to be paid. It is not in dispute that the premium paid by the appellant for the purchase of the four houses must be taken into account, but as to the rental of 9 and 10 the commissioners say that it has not been their practice to carry such a rent into the account, as they are of opinion that it does not come within the section. The Solicitor-General agrees that the commissioners are right as regards this, and does not appeal as to the rent of those two houses.

(1) (1881) 8 Rettie, 389. (2) (1833) 1 C. & M. 644; 38 R. R. 701.

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A. L. Smith L.J.

Then we come to the apportioned rent of 7 and 8. When once we get to this—that the rent is not to be taken into consideration in assessing the duty because it is part and parcel of the thing demised—I cannot see what is the difference between the two cases, or why the apportioned rent does not fall in the same category as the rent of the other two houses.

I am of opinion that the appeal fails, and that it should be dismissed.

COLLINS L.J. I am of the same opinion, and I have nothing to add to the considered judgment of the Court below.

VAUGHAN WILLIAMS L.J. I entirely agree.

Appeal dismissed.

Solicitors for appellant: *Bridgeman & Wilcocks, for Baker, Watts, Alsop & Woollcombe, Newton Abbot.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
Dec. 8.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLANTS; BISHOP, RESPONDENT.

Revenue—Income Tax—Life Insurance Company—Participating Policy-holders—Return of Premium by way of Bonus—Annual Profits or Gains—Income Tax Act, 1853 (16 *&* 17 *Vict. c.* 34), *Sched. D.*

A life insurance company had a capital divided into shares, the dividends on which were limited by the articles of association to 7 per cent. The powers of the company were vested in a board of directors elected by the shareholders; the board appointed the officers of the company, and by the officers determined the rates of premium and the terms of insurance, and generally managed the affairs of the company. The company issued participating policies, and by the articles the insurance business was to be conducted on the mutual plan. The earnings and receipts over and above the dividends, losses, and expenses were accumulated from year to year, and every five years a balance was struck and the net surplus in the hands of the company, after deducting an amount sufficient to cover all outstanding risks and obligations, was, in compliance with the articles of association, divided among the holders of participating policies, each policy-holder being credited with an equitable share of such surplus:—

Held, that the surplus returned or credited to the policy-holders was "annual profits or gains," and was assessable to income tax.

Last v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, and *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered.

Decision of the Divisional Court, [1899] 2 Q. B. 439, affirmed.

APPEAL from the decision of a Divisional Court in favour of the respondent, on a case stated by commissioners for the general purposes of the Income Tax Acts for the City of London, from which the following facts appeared.

The Equitable Life Assurance Society of the United States (called throughout the case the company) appealed against three assessments of 80,000*l.* each, made upon them under Sched. D of 16 & 17 Vict. c. 34, for the years ending April 5, 1895, 1896, and 1897 respectively. The company had been established by charter under the insurance laws of the State

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of New York, and the principal office for the transaction of business was located in the city of New York.

By art. 3 of the charter it was provided (inter alia) as follows: "The capital of the said company shall be 100,000 dollars in cash, divided into shares of 100 dollars each, which shall be personal property transferable only on the books of the company in conformity with its by-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them not to exceed 3½ per cent. of the same, such dividends to be paid at the time and in the manner designated by the directors of the said company. The earnings and receipts of the said company over and above the dividends, losses and expenses shall be accumulated."

By art. 4 it was provided that—"The corporate powers of the said company shall be vested in a board of directors and shall be exercised by them and by such officers and agents as they may appoint and from time to time empower."

After appointing by name the persons who should constitute the first board of directors, and who should hold office until their successors were appointed, provision was further made for the filling of vacancies by the remaining directors and for the term of office of the board of directors, also for the time and mode of election of the board, and it was further provided as follows: "In the election of directors every stockholder in the company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. At any time hereafter the board of directors after giving notice at the two previous stated meetings may by a vote of three-fourths of all the directors provide that each life policy-holder who shall be insured in not less than 5000 dollars shall be entitled to one vote at the annual election of directors, but such vote shall be given personally and not by proxy."

By art. 5 the board of directors were empowered to elect annually a president and vice-president, and to appoint a secretary and such other officers as they might deem requisite, and power was given to the directors to enact by-laws, rules, and regulations for the government of the officers and agents and for the management of the affairs of the company. The direc-

tors were further empowered to determine the rates of premium and the amounts to be insured on any one life and the terms of such insurances.

Art. 6 was as follows: "The insurance business of the company shall be conducted upon the mutual plan. All premiums shall be payable in cash. In case any policy-holder shall omit to pay any premium due from him to the company or violate any other condition of the policy of insurance the board of directors may forfeit his policy and apply all previous payments to the benefit of the company.

"The officers of the company within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company which shall exhibit its assets and liabilities both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy-holder shall be credited with an equitable share of the said surplus. Such equitable share after being ascertained shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share at such interest as the directors may designate, or if any policy-holder so direct such equitable share of surplus shall be applied to the purchase of an annuity at such rate of interest as the directors shall designate to be applied in the reduction of his or her future premiums. In case of death the amount standing to the credit of the party insured at the last preceding striking of balance as aforesaid shall be paid over to the person entitled to receive the same, and the proportion of surplus equitably belonging to him or her at the next subsequent striking of balance shall also be paid when the same shall have been ascertained and declared."

"In case of death of any party insured prior to passing any period for striking of balance as aforesaid the board of directors may provide what (if any) share of such surplus shall be paid to such person."

"The officers of the company within the first thirty days

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after the expiration of five years from December 31, 1859, shall cause a general balance statement of the affairs of the company to be made, which shall be open to the inspection of any policy-holder for sixty days during the usual hours of business. Said statement shall shew the amounts received during the preceding five years for premiums, interest, and annuities, and also the amounts paid during the same time for losses, expenses, and otherwise, and the balance remaining in the treasury, together with the manner in which the same is invested."

A share capital of 100,000 dollars is required to be subscribed by every insurance company, whether a mutual or shareholders' company, by the laws of the State of New York, and this capital is always invested in United States Government bonds (yielding about 4 per cent.), and deposited with the Controller of the State of New York in compliance with the law.

A branch or department of the said company for Great Britain and Ireland had been established, and carried on business at 6, Princes Street, in the City of London, under the management of a London board of directors, with a chairman, secretary, general manager, and trustees.

The power given by the charter under which each policy-holder of 5000 dollars was entitled to vote, but not by proxy, for the election of a director after three-fourths of the directors should agree thereto had not been exercised.

It was admitted that the board of directors alone by their officers managed the affairs of the company; that they decided and declared the amount that should be divided amongst the policy-holders and the amount of the reserve that should be set aside; that the control of the assets and of the investments, the opening of branches, and all other affairs of the company was with them, and that the policy-holders had no power to interfere in the management of the company, except as referred to in the preceding paragraph.

The undivided surplus over and above the company's liabilities under their policies, and calculated on a 4 per cent. actuarial valuation basis, amounted, at the end of 1894, to 7,787,458*l.*, at the end of 1895 to 8,442,502*l.*, and at the end of 1896 to 8,995,245*l.* Policies were also granted by the company

to persons without right of participation in the profits of the company. The company, as part of their business in the United Kingdom and in consideration of fixed premiums paid, granted endowment bonds maturing at stated periods, annuities for single lives, joint lives, and deferred and survivorship annuities; profits arising from the above classes of business were brought into and formed part of the surpluses above mentioned.

The net premiums and interest (*a*) arising from the securities in which the share capital is invested, and (*b*) arising from the general investments of the company after provision for liabilities, including death claims, annuities, maturing endowments, &c., were applied as follows: all expenses and outlays determined by the directors in their discretion were paid, then a reserve as required by the regulations of the insurance department of the State of New York was set aside; then a dividend not exceeding 7 per cent. was paid to the shareholders on their capital; then such sums by way of reserve or surplus reserve were set aside as the directors in their discretion might determine, and the balance, as the directors might determine, was then invested to provide for a division amongst the participating policy-holders of the company by way of bonus on or increase to the amount insured according to such principles and methods as might from time to time be adopted by the society (through the directors) for such distribution.

The company advertised in their prospectus that "no liability attaches to policy-holders."

The contentions on the part of the Inland Revenue on the above facts were, that the company and its assets were not the property of the policy-holders, and that they had no control, power, liability, or right except such as the shareholders by their directors chose to give to them; that the policy-holders were not members of the company, but were third persons who contracted with the company; that the accumulated funds were not the property of the policy-holders, but were accumulated profits; that the company could not properly claim to be a mutual insurance company; that the provisions of art. 6 of the charter, that the business of the company should be

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conducted upon the mutual plan, could only relate to the division of such portion of the profits as the directors might determine and direct to be divided; that the provision for division of a portion of the profits over and above the fixed dividend payable to the shareholders did not alone make the company a mutual insurance company, and that the net surplus, so far as the same was derived from premiums received in the United Kingdom, was a profit or gain of the company liable to be assessed to income tax under 16 & 17 Vict. c. 34, Sched. D.

The company cited the case of *New York Life Insurance Co.* v. *Styles* (1), and thereon contended that the premiums paid to the company were contributed as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance was not profit or gain liable to assessment, but was merely an excess of contribution over expenditure, which they contended would ultimately be returned to the contributors.

The commissioners of taxes were of opinion that the company was not a mutual insurance company within the meaning of the decision in *New York Life Insurance Co.* v. *Styles* (1), and was liable to be assessed to income tax on profits or gains made in the United Kingdom, and they confirmed the assessments accordingly.

The Divisional Court (Darling and Channell JJ.) gave judgment for the respondent. (2)

The appellants appealed.

Sir R. T. Reid, Q.C., and *Foote, Q.C.* (*C. H. L. Neish* with them), for the appellants. That is substantially a mutual insurance company, and the surplus premium income returned to the policy-holders is necessarily returned by virtue of the constitution of the company, and not by virtue of an arrangement made with the shareholders, or at the discretion of the directors. It is immaterial whether the amount returned is certain or uncertain, and at what period it is ascertained. It can only be applied in reducing future premiums or enlarging the sum insured. The shareholders who have subscribed only

(1) 14 App. Cas. 381. (2) [1899] 2 Q. B. 439.

100,000 dollars have no interest in the success or otherwise of the society, except so far as they run the risk of receiving less than the stipulated 7 per cent. or losing their investment. Their position is exactly like that of debenture-holders. In *Last* v. *London Assurance Corporation* (1) there were shareholders who made a profit on their capital, and the decision was based on that fact. This case does not fall within that decision, but is governed by *New York Life Insurance Co.* v. *Styles* (2), and the premium paid to the participating policyholders is not assessable.

Cripps, Q.C., and *Danckwerts*, for the respondents, were not called on.

A. L. SMITH L.J. In my opinion the judgment of the Divisional Court was right. The question is whether three sums of 80,000*l.* made by the Equitable Life Assurance Society of the United States in this country are chargeable with income tax under Sched. D. The Divisional Court has held that they are chargeable, and the society appeals. Similar, though not identical, cases have been twice before the House of Lords. In *Last* v. *London Assurance Corporation* (1), the House of Lords decided in favour of the Crown. In *New York Life Insurance Co.* v. *Styles* (2) they decided in favour of the insurance company. It is now contended on the part of the appellants that this case comes within the decision in the last-mentioned case. The surveyor of taxes, on the other hand, contended that it was governed by the former case. Now, what was decided in that case? I will read the head-note because it describes tersely the facts and the decision in that case: "A life insurance company issued 'participating policies' at an increased premium, according to the terms of which at the end of each quinquennial period 'the gross profits' of such policies were thus dealt with: two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force; the remaining third went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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only profit available for division among the shareholders:—Held, ... that the two-thirds returned to the policy-holders were 'annual profits or gains' and assessable to income tax."

That was a company managed by directors. It had shareholders, and also participating policy-holders, who were not members of the company, but were entitled to the return of a bonus, or an abatement of the premium they paid, if and when the profits made by the company were sufficient to allow of this. There was a difference of opinion, from the time the case was before my brother Day and myself up to the time when it came before the House of Lords, whether these returns were profits, or part of the expenses of carrying on the business of the company; and the House of Lords ultimately decided by a majority that they were not part of the expenses but were profits, and that it mattered not in what form the company dealt with the profits after they had been earned. Lord Bramwell in *New York Life Insurance Co.* v. *Styles* (1) describes the decision thus: "I understand the principle of that decision to be, that there was a company making profits, meaning to make profits, not from its own members"—that is, not from its own shareholders—"but from those it dealt with"—that is, the participating policy-holders; "that although it returned two-thirds of those profits to those it dealt with, they were not the less profits, and that therefore income tax was payable on them. I thought, and still think, that wrong. I thought that the profits were only what remained, after the return they had agreed to make, on what was divisible among the shareholders." That was Lord Bramwell's view of the case in which he was a dissentient judge.

Now, does this case come within that description? Here we have a company established by charter under the insurance laws of the State of New York. It has directors and shareholders and the capital of the company is 100,000 dollars, divided into 1000 shares of 100 dollars each. Therefore, we have the distinct entity of a company as in *Last's Case* (2)—which, in my judgment, is precisely similar to the present one—and in that case it was held that a return made to the

(1) 14 App. Cas. 381. (2) 10 App. Cas. 438.

policy-holders bore income tax and passed as profits of the corporation.

Now, what is the argument by which it is sought to get out of the decision in *Last's Case* (1)? It really comes to this—that in the present case the share capital is so little that we ought to take no notice of it. It is only 20,000*l.*, the shareholders are few, and they only get 7 per cent. In my judgment that is no answer, because whether the share capital is large or small there is the separate entity of this company carrying on business for profits and gains.

I cannot, as I have said, distinguish between the two cases; but then it is said that there is a subsequent case in the House of Lords, *New York Life Insurance Co.* v. *Styles* (2), which was differentiated from *Last* v. *London Assurance Corporation* (1), and that within the principle of this subsequent case the one before us falls. If that were well founded, of course, we should follow the later case, and we must, therefore, see how the House of Lords distinguished the two cases. It seems to me that the distinction drawn was that *New York Life Insurance Co.* v. *Styles* (2) was a case of mutual insurance pure and simple, that the members were partners inter se, and that there was no profit-making at all in the concern, whereas in *Last's Case* (1) it was not so. It is stated (3) "the company has no shareholders and there are no shares. The company is organised for and (except as hereinafter stated) does business solely under the plan of mutual insurance." There were no directors, no shares, and no shareholders. Lord Halsbury L.C. and Lord FitzGerald did not think that made any difference; but the other Law Lords, Lords Watson, Bramwell, Herschell, and Macnaghten, thought that it did. Thus Lord Watson says: "There are no shares and no shareholders, in the ordinary sense of the term, but each and every holder of a participating policy becomes, ipso facto, a partner of the company, with a voice in its administration, entitled to a share of its assets, and liable for all losses and expenses incurred by it." Lord Herschell, after stating the facts in *Last's Case* (1), proceeds to distinguish the case before

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.
(3) In *Styles's* case, 14 App. Cas. at p. 382.

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him on the ground that he could not think that persons associated together, in the manner that he had described, for the purpose of mutual insurance, carry on a trade or vocation from which profits or gains accrue to them. "Persons," he says, "who agree to contribute to a common fund for mutual insurance, certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit." Lord Macnaghten also pointed out the difference between the two cases. Of *Last's Case* (1) he says: "There the insured were not members of the corporation. There the corporation was formed to carry on a business that had for its object the acquisition of gain by the corporation itself, as well as by the individual members. It was a trading concern." I know it was argued in the present case that the society was a trading concern. It gets premiums to a large amount, and by lending money makes profits, and it is not a fact, as was suggested, that the premiums which are paid by the participating policy-holders are put by in order to be returned to them at the end of five years. Lord Macnaghten points out that the promise of a return of a large portion of the profits was the attraction to a particular class of customers who brought profitable business to the concern, and that in *Last's Case* (1) it was held "that the amount so returned could not be treated as an expenditure for the purpose of earning profits, and that income tax must be paid on all the profits earned by the corporation, however they might be dealt with afterwards." I cannot read these judgments without seeing that the present case was outside the case that the House of Lords then had before it, nor can I read the judgments of Lords Blackburn and FitzGerald in *Last's Case* (1) without seeing that that case and the present one are alike.

For these reasons I think the appeal must be dismissed.

COLLINS L.J. I am of the same opinion. I think this case is undistinguishable in principle from *Last's Case*. (1) There, as here, there was a corporation, a separate entity, carrying on a business, part of which consisted in issuing participating

(1) 10 App. Cas. 438.

policies, and one of the terms upon which these policies were issued was that at certain intervals a certain proportion of the profits should be returned to the holders of such policies, either by way of reduction of the premium, or as an addition to the sum insured. The question discussed in that case was whether that proportion should be deducted as a part of the expense of earning profits (as Lord Bramwell thought it was), or whether it was a sum payable out of profits when earned. That question has been finally decided by the House of Lords in such a case—that is, the case between an independent company and independent participating policy-holders. It was held that the participating policy-holders, not being members of the company, were in the relation of creditors to the company, and that part of the profits of the company were paid to these persons as creditors of the company—that is to say, the fund out of which they were paid was profits in the hands of the company before they, in pursuance of a prior agreement, handed back a portion of those profits. Now, it seems to me that in giving effect to that principle our decision cannot depend upon whether the proportion which the company has agreed to pay back out of their profits is larger or smaller, or whether it even embraces the whole. In this particular case there is the element that I have named, and the only distinction in point of fact between it and *Last's Case* (1) that I can see is that, whereas in that case the proportion of profits which the company agreed to return was two-thirds, retaining one-third themselves, in this case the proportion of profits with regard to which they accept the obligation to return it is the whole, though they never in point of fact do divide the whole of the profits among the participating policy-holders; they keep a portion for distribution further on.

Now, those facts appear to me to bring this case directly within the authority of *Last's Case* (1); but it was strongly urged upon us that there is another decision of the House of Lords, namely, *Styles' Case* (2), and that rightly considered this case that we are now deciding falls under it. When the facts are examined I think the distinction is perfectly clear—in

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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fact, I need hardly have added anything to the very lucid statement of Darling J. in the Court below upon this point. There were in *Styles' Case* (1) a number of persons who constituted the sole members of the company, and what they did is thus described by Lord Watson. He says at page 394 of the report: "When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits." That is precisely the class of company to which this society does not belong. The only possible basis upon which a distinction could be made between this case and *Last's Case* (2) is that which was put in argument—that though here there is a company, it does not in substance come within the class of companies that is dealt with in *Last's Case*. (2) It was said the company consists of shareholders having a share in only a sum of 20,000*l*., and that their whole interest in the trading of the company consists in a right out of that trading to get their 4 per cent. turned into 7 per cent. It was suggested that this is so slight an interest as to justify its being said that the principle of the decision in *Last's Case* (2) does not apply. That, however, can make no difference in point of principle; and I think also that when the case is examined it is not a fact in substance, because although that is the capital of the company, and the 7 per cent. is what the shareholders divide, still, if we accept the principle of *Last's Case* (2), what this company are doing is, they are carrying on an enormous business and making an enormous profit. It is true that after they have made a profit they distribute that profit to persons other than themselves, but the management of it—the whole conduct of the business of earning the annual profits—is just as much done by the company here as it was done in the case of the company in *Last's Case*. (2) If those are profits before they are distributed, they are just as much profits in the hands of the

(1) 14 App. Cas. 381. (2) 10 App. Cas. 438.

company here as were the profits in the hands of the company in *Last's Case*. (1) The principle that governs this case is that where there is this division between a company and policy-holders who are not members of the company, then these sums are not part of the expenses of earning the profits, but are themselves the profits earned. For these reasons I am clearly of opinion that the judgment of the Court below is right.

VAUGHAN WILLIAMS L.J. I am of the same opinion. We have not got in this case to decide a question of abstract justice as to the incidence of taxation. We have to deal with a statute, and we have to ascertain what is the line drawn by that statute, and we have to decide on which side of that line this particular case comes. If the case comes plainly upon one side of the line, it is no good for those who wish that the case were on the other side of the line to say that the case is not much over the line, or is only a little past the line.

Now, before saying anything else as to this case, I would like to point out that in dealing with the question whether a particular receipt is a profit for the purpose of taxation it does not matter whether or not, for the purposes of distribution or carrying on the business, the machinery of a company is used. The decision in *Styles' Case* (2) is a decision which is really based upon the relations of the members of the insurance association in that case to each other; and the fact that their relationship was worked out by means of an incorporated company was not allowed to differentiate the case or affect the case in any degree whatsoever. So, in the present case, the mere fact that the relationship of the parties interested in this business was worked out by the machinery of an incorporated company does not make any difference whatsoever. We have to look and see who are interested, and if we find as a fact that there are those interested who take a profit outside and beyond the proportion of the surplus which is paid to the participating policy-holders, in reduction really of the cost of insurance, in such a case the company is not really mere machinery for working out the mutual relation of the members of a mutual insurance company. It is a company the

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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machinery of which is used for the purpose of making a surplus beyond the expenditure and applying that surplus, not merely in reduction of the costs of insurance to which the members contribute, but also in paying the profit as such to someone else. When the facts of the three cases are looked at, there is a very significant difference between them. In *Last's Case* (1) the machinery of the company was not used only for the purpose of distributing, in reduction of the cost of insurance, the surplus of the receipts beyond the expenditure, but one-third of such surplus was handed over as profits. In *Styles' Case* (2) there was no such dealing with any part of the surplus whatsoever. The whole of the surplus was appropriated to the reduction of the cost of insurance. In the present case it is not true to say that the whole of the surplus is used in reduction of the cost of insurance, because there is some of it paid to the shareholders of the company who are entirely different people from the members of the mutual insurance body. They, it is true, are only shareholders in a company which in a sense came into existence for the purpose of working out the relations of the members of the mutual insurance to one another; but they are at the same time something different, and they receive moneys as profit in which the insured members have no interest whatsoever—that is to say, they receive the difference between the 4 per cent. and the 7 per cent. clearly as profits going into their pockets. That difference between 4 per cent. and 7 per cent. on the 20,000*l.* deposit provided by the shareholders does not differ in kind one jot from the one-third profit that went to the company in *Last's Case* (1), and I agree, therefore, to the full that this case is really governed by *Last's Case*. (1)

I want to say one word about the surplus here. It seems to me that Lord Halsbury, when he delivered his judgment in *Styles' Case* (2), was of opinion that if there were an insurance company which consisted simply of members of a mutual association, and with no such outside body receiving profit as in *Last's Case* (1), yet if that insurance company made a surplus by the investment of their money in a trade or business they would be carrying on a business and making a profit

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

thereby; and I do not understand him to say that in that case he would have excluded any part of the surplus from taxation whether it was returned to the members or whether it was not. But, as I understand the decision of the majority, they draw a distinction, and they seem to say that in respect of so much of the surplus as arises from the mutual assurance business—by which, I suppose, is meant so much as arises from the rates of premium charged over and above the actuarial rates in principle, or by a fortunately healthy state of things, the profit being above what was necessary for the purpose—then in such a case the income tax is only chargeable on so much of the surplus as is made by what I will call outside business, and is not chargeable in respect of so much of the surplus as comes from the excess which has been collected for the purpose of the premiums.

Now, in the present case I do not understand that the appellants suggest that they are exempt from taxation in any respect, excepting with regard to so much of the surplus as comes from the business done by this company in respect of participating policies. They do not deny that if the premiums had been invested, or still less if they had been invested in carrying on a subsidiary business, that so much of the surplus is taxable; but even in respect of so much of the surplus as is properly attributable to the business of issuing these policies to the participating members, it seems to me, for the reasons which my brethren have given, and which I also have tried to express, that it is plain that the income tax must be paid, because the company do not in respect of that part of the surplus pay it all back to the members of the mutual association, but pay a part of it as a profit to a body outside the mutual insurance association, or outside the aggregate body of participating policy-holders, in the shape of the 7 per cent. which is paid to the shareholders of this company.

Appeal dismissed.

Solicitors for appellants: *Neish, Howell & Macfarlane.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

A. M.

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1899
Dec. 4, 5, 20.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL *v.* THE LONDON COUNTY COUNCIL.

Revenue—Income Tax—Deduction of Income Tax from Interest or Annuities —Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60, 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Scheds. A, D—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The London County Council had deducted income tax under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, from dividends paid by them on their consolidated stock. These dividends were paid out of the council's Consolidated Loans Fund, which was by statute made applicable in the first place to their payment. That fund consisted of (among other things) interest which had been received by the council on loans made by them to other local authorities, and from which, in accordance with the sub-section, income tax under Sched. D had been deducted before payment, of the rents and profits of land on which income tax under Sched. A had been paid, of the proceeds of sales of property, and of money raised by rates:—

Held, that the county council were entitled to retain a proportion of the income tax which they had deducted corresponding to the proportion in which the dividends on the consolidated stock had been paid out of moneys on which income tax under Sched. D had been already paid; but that they were not entitled to retain a proportion of the deducted income tax corresponding to the proportion in which the dividends had been paid out of moneys charged with income tax under Sched. A.

Question as to the proportion in which the dividends on the council's consolidated stock should be deemed to have been paid out of the interest received by the council on loans discussed.

APPEAL from the judgment of a Divisional Court (Day and Lawrance JJ.) upon an information by the Attorney-General. (1)

The information was as follows:—

1. By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), it was, amongst other things, enacted as follows:—

Sect. 3: "After the passing of this Act the board shall not (except for such temporary period not exceeding six months as the Treasury may from time to time sanction) raise other-

(1) [1899] 2 Q. B. 226.

wise than in conformity with this Act, and with the sanction of the Treasury, any money under any powers of borrowing whether conferred by the Acts mentioned in the first schedule to this Act or otherwise howsoever."

Sect. 4: "The board, for the purpose of raising such portion of the loans authorized by the Acts mentioned in the first schedule to this Act for the purposes of those Acts as the Treasury may from time to time sanction, may create capital stock to be called the Metropolitan Consolidated Stock, in this Act referred to as consolidated stock, and to be issued in such amounts and manner, at such price and times, on such terms, subject to such conditions, with such dividends, and redeemable (at the option of the board) at par at such times and on such conditions as the Treasury before the creation thereof may from time to time approve."

Sect. 5: "No holder of any portion of consolidated stock shall have any priority or preference by reason of the prior creation of such stock or otherwise, and all consolidated stock created for the purposes of the Acts mentioned in the first schedule to this Act, or of any Act hereafter to be passed, and the dividends thereon, and the sums required for the redemption thereof, shall be charged indifferently on the whole of the lands, rents, and property belonging to the board under the Acts mentioned in the first schedule to this Act, and on all moneys which can be raised by the board by rates under this Act, and on the improvement fund, subject to all charges existing at the passing of this Act on such lands, rents, property, moneys, and fund respectively, and shall be a first charge thereon after those charges, and all moneys required for the payment of the dividends on such stock, and the sums required to be raised for the redemption of such stock as mentioned in this Act, shall be raised out of the improvement fund and Metropolitan Consolidated Rate as in this Act mentioned."

Sect. 22: "The board, for the purpose of paying the dividends on and redeeming the consolidated stock, and also of defraying the expenses authorized to be incurred and incurred by them in the obtaining or the execution of the Acts mentioned in the first schedule to this Act or any of them, and of defraying the

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sums required for the payment of the principal and interest of and the sinking funds for any securities granted by the board for the purposes of those Acts or any of them before the passing of this Act, shall (in lieu of all rates or assessments authorized at the passing of this Act to be assessed by them generally over the metropolis) from time to time assess and raise a rate to be called the Metropolitan Consolidated Rate, in this Act referred to as the Consolidated Rate."

Such rate shall be assessed and raised in manner provided by the Metropolis Management Act, 1855, and the Acts amending the same, with respect to the sums required for defraying the expenses of the board in the execution of that Act, and to sums assessed for the purposes of the Main Drainage Acts, and may be assessed wholly or in part in respect of expenses incurred or to be incurred, and also in respect of any unpaid balance of a former rate, and all the provisions of the Metropolis Management Act, 1855, and the Acts amending the same, concerning the estimate on which assessments by the board are to be made, and for and in relation to the assessing, raising, and enforcing payment of the sums assessed by the board, shall, subject to the provisions of this Act, extend and apply to and in the case of the consolidated rate in the same manner as if that rate were therein mentioned instead of the sums required for defraying the expenses of the board incurred in the execution of the Metropolis Management Act, 1855, and for the main drainage rate respectively.

Every precept issued by the board for the purposes of the metropolitan consolidated rate shall specify, first, the proportion of the amount named in the precept which is required for the purpose of paying the principal and interest of and sinking fund for securities granted by them before the passing of this Act, and the dividends on and the sums required for the redemption of consolidated stock under this Act, and, secondly, the proportion of such amount which is required for all other purposes of the board.

In making an estimate for the first-mentioned portion of the consolidated rate, the board shall compute the part required in

respect of securities granted or stock issued for the purposes of the Main Drainage Acts and the Fire Brigade Act respectively.

In making an estimate for the last-mentioned portion of the consolidated rate, the board shall not estimate the sum required for the purposes of the Fire Brigade Act as larger than a sum which would be produced by a rate of one halfpenny in the pound on the gross value of the property assessed to the metropolitan consolidated rate, and shall compute the part of the said portion of the consolidated rate required for those purposes.

The board shall state in every precept, and shall keep a record of, all computations required to be made by this section, which record shall be open to inspection by any person on payment of a fee not exceeding one shilling, and shall be conclusive for all purposes whatsoever.

Nothing in this section shall delay or accelerate, or authorize the board to delay or accelerate, the repayment of any principal or interest of, or the providing of a sinking fund for, any securities granted by the board before the passing of this Act for the purposes of the Main Drainage Acts without the consent of the holders thereof; and while such securities remain undischarged the board shall from time to time ascertain the amount which would have been raised by the levying of the main drainage rate, and the amount which would have been so raised shall be charged on the consolidated rate, and be deemed to be from time to time payable thereout before any portion of that rate is applied to any other purpose.

Nothing in this section shall extend to any sum levied under s. 181 of the Metropolis Management Act, 1855.

Sect. 26: "For the purpose of paying the dividends on and redeeming consolidated stock created under this Act, there shall be established a fund to be called the Consolidated Loans Fund of the Metropolis, in this Act referred to as the Consolidated Loans Fund, and, subject to the provisions of this Act, the board shall keep a separate account of such fund."

Sect. 27: "The board shall carry to the Consolidated Loans Fund the moneys following (after providing for all charges on

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such moneys existing at the passing of this Act, and to which the same shall for the time being be applicable); that is to say—

"(1.) All moneys whether in the nature of capital or otherwise arising from the sale, lease, or other disposition of lands, rents and property belonging to the board;

"(2.) The residue of the improvement fund which may come into their hands in the manner mentioned in this Act;

"(3.) Such an annual sum in every year out of the consolidated rate, and out of the contributions paid to the board in pursuance of the Fire Brigade Act, or out of one of such sources, as may be equal to two per cent. on the total nominal amount of consolidated stock, whether it has been cancelled or not; or,

"(4.) Such greater or less annual sum as the Treasury may from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the consolidated stock in sixty years from the date of the creation thereof."

Sect. 28: "The board shall from time to time apply the Consolidated Loans Fund according to such regulations as may be approved by the Treasury, first in the payment of the dividends on consolidated stock, and then in one or more of the following modes, namely, in purchasing Metropolitan Consolidated Stock and in redeeming Metropolitan Consolidated Stock, and in payment of the principal of the securities granted before the passing of this Act.

"The board may in the meantime invest such fund (subject to the said regulations) in Government securities, the interest of which and the resulting income thereof shall form part of the Consolidated Loans Fund, and shall be applied and may be invested in the same manner.

"All consolidated stock purchased and redeemed and all securities paid in pursuance of this section shall be cancelled, and thereupon all dividends and interest in respect thereof shall be extinguished."

2. By the said Act and divers subsequent Acts of Parliament (Metropolis Money Acts) the said board and the defendant county council were empowered to lend to divers local authorities

sums of money, and by the said Acts it was and is directed that the interest paid and principal repaid by the local authorities in respect of such loans shall be carried to the Metropolitan Consolidated Loans Fund.

3. The defendant council succeeded the said board on April 1, 1889.

4. By the London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), it was enacted:—

Sect. 15: "Sect. 28 of the Metropolitan Board of Works (Loans) Act, 1869, is hereby repealed. The Consolidated Loans Fund shall, subject to regulations approved by the Treasury, be first applied in the payment of the dividends on consolidated stock, and then in purchasing and redeeming consolidated stock and in payment of the principal or instalments of principal due on securities granted before the passing of the Metropolitan Board of Works (Loans) Act, 1869, or for debts and liabilities transferred from the counties of Middlesex, Surrey, and Kent, and apportioned to the county of London under s. 40 of the Local Government Act, 1888. The council may in the meantime, and subject to regulations approved by the Treasury, invest any money for the time being forming part of the Consolidated Loans Fund in any stocks, funds, or securities in which cash under the control or subject to the order of the Supreme Court may be invested under any order of the Supreme Court for the time being in force."

Sect. 17: "The council may from time to time within twelve months after the issue of any consolidated stock carry to the dividend account in the Consolidated Loans Fund, for the purpose of providing for the payment of dividends on such stock from the dates fixed at the time of such issue, though the same may be earlier than the dates fixed for receiving the cash instalments on account of such loan, so much of the money arising from the issue of such stock as they may require for that purpose and as the Treasury approve, and may from time to time apply the money so carried to such dividend account to the payment of such dividends."

Provisions similar to s. 17 aforesaid are contained in divers other Acts applicable to the defendant council.

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5. By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), it is enacted (s. 24, sub-s. 3):—

"Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty and recoverable as such accordingly; and the provision contained in section 8 of the Act of the thirteenth and fourteenth years of Her Majesty's reign, chapter ninety-seven, now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax."

6. The said board and the defendant county council, from time to time being thereunto authorized by divers Acts of Parliament, raised large sums in accordance with the provisions of the said Acts hereinbefore set out. They have also lent large sums to local authorities, the interest on which and part of principal repaid are payable into the said Consolidated Loans Fund under the enactments hereinbefore referred to.

7. The total sum paid by the defendant council by way of dividends and interest on loans made to the said board and the defendant council during the year April 1, 1897, to March 31, 1898 (inclusive), was 1,142,884*l.* 6*s.* 9*d.*, the income tax on which under Sched. D of the Income Tax Acts at 8*d.* in the pound amounts to the sum of 38,096*l.* 2*s.* 10*d.* The defendant council in paying the said dividends deduct and have deducted, and retain and have retained, the income tax payable thereon under the said Sched. D, except in the cases where the recipients of the dividends are exempt from payment of the said income tax, and excepting that the defendant council do and did not deduct or retain the tax where it amounts to fractions

of a penny. The total tax not deducted during the said year, either because the recipients were exempt or because it amounted to fractions of a penny, was the sum of 1424*l.* 11*s.* 9*d.*, leaving, consequently, the sum of 36,671*l.* 11*s.* 1*d.*, as and being the sum which the defendant council had deducted and retained as and for income tax under Sched. D, payable on the dividends due to the holders of the stock created as aforesaid. The defendants have paid to Her Majesty the sums of 8490*l.* 6*s.* 8*d.* and 8217*l.* 15*s.* 2*d.* on December 23, 1897, and July 27, 1898, respectively and no more, thus leaving a balance of 19,963*l.* 9*s.* 3*d.* unpaid.

8. During the half-year April 1, 1898, to September 30, 1898 (inclusive), the defendant council paid by way of dividends and interest on loans made to the said board and the defendant council the sum of 587,055*l.* 3*s.* 8*d.*, the income tax on which under Sched. D of the Income Tax Acts at 8*d.* in the pound amounts to 19,568*l.* 10*s.* 1*d.* In paying the said dividends the defendant council did deduct and retain the said income tax, except in cases where the recipients of the dividends are exempt from the payment of the said income tax, and excepting that the defendant council did not deduct or retain the tax where it amounts to fractions of a penny. The total tax not deducted in the said half-year, either because the recipients were exempt or because it amounted to fractions of a penny, was the sum of 721*l.* 12*s.* 6*d.*, leaving consequently the sum of 18,846*l.* 17*s.* 7*d.*, as and being the sum which the defendant council had deducted and retained as and for income tax under Sched. D, payable on the dividends due to the holders of the stock created as aforesaid. The defendants have paid to Her Majesty the sum of 7811*l.* 13*s.* 11*d.* on December 7, 1898, and no more, thus leaving a balance of 11,035*l.* 3*s.* 8*d.* unpaid.

9. The Attorney-General charges that none of the said dividends are by law payable out of profits or gains brought into charge to the income tax under Sched. D, and that the whole of the sums deducted as aforesaid are payable to and should be accounted for to Her Majesty by the defendant council.

10. The Attorney-General alternatively alleges and charges

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as follows: The said consolidated stock and the dividends thereon are, by virtue of the said Act of 1869 and the subsequent Acts, made a charge upon the lands, rents, and property belonging to the defendant council and their predecessors, the said board, under the Acts mentioned in the first schedule to the said Act of 1869, and on all moneys, whether in the nature of capital or otherwise, arising from the sale, lease, or other disposition of lands, rents, and property belonging to the defendant council, and upon all sums received by the defendant council from the divers local authorities to whom they have made loans under the statutes above referred to in respect of interest on or the principal of such loans, and on all moneys which can be raised by the council by rates under the said Act of 1869; that the only part of the said fund which can be brought into charge to the income tax under Sched. D of the Income Tax Acts is the interest received on loans to the said local authorities; that it is consequently only a rateable proportion of the said dividends on the said consolidated stock which can be regarded as being payable out of profits and gains brought into charge to the income tax under Sched. D; that is to say, a proportion corresponding to the proportion in which the said interest on loans to local authorities is legally applicable and applied to the payment of the said dividends on consolidated stock, and that the defendant council is bound to pay over to Her Majesty all the income tax deducted by them save that deducted on such rateable proportion as last aforesaid.

11. The Attorney-General, by way of a further alternative, alleges and charges as follows: The said Consolidated Loans Fund has only one constituent portion which is chargeable to the income tax under Sched. D of the Income Tax Acts, namely, the said interest paid to the defendant council by local authorities on the loans made to them, and no other constituent so chargeable, and that such consolidated loans fund is by law applicable in the first place to the payment of dividends on consolidated stock and loans to the defendant council, and then in purchasing and redeeming consolidated stock and the payment of the other matters enumerated in s. 15 of the said Act of 1889, that a rateable proportion only, and no more, of the

said interest payable by the said local authorities is applicable and applied to the payment of dividends on the said consolidated stock and loans to the defendant council, and that, therefore, no part of the dividends paid by the defendant council, excepting only an amount thereof equal to the said rateable proportion of the said interest, is payable out of profits or gains brought into charge to the income tax under Sched. D, and that the defendant council ought to deduct and account to Her Majesty for the whole of the income tax on the said dividends, excepting only the tax on the amount equal to the said rateable proportion of the said interest.

The defendant council averred in their answer that they had paid the sums of 1,142,884*l.* 6*s.* 9*d.* and 587,055*l.* 3*s.* 8*d.* mentioned in the information by way of dividends on consolidated stock partly out of rents and profits of lands charged with income tax under Sched. A, partly out of interest on loans to local authorities and other interest or annual payments charged with income tax under Sched. D, and partly (that is to say, to the extent to which such receipts were insufficient) out of sums raised by rate. They contended that in so far as the said dividends were paid out of rents and profits of lands, or out of interest or other payments already charged with income tax, either by way of deduction as and when they were received by the defendant council or otherwise, the council were entitled to deduct and retain income tax on dividends paid out of such rents and profits interest and payments already charged, and that they had deducted and retained income tax on dividends so paid and no more.

The following regulations were approved by the Treasury under s. 15 of the London Council (Money) Act, 1889, with respect to the application of the Consolidated Loans Fund and the temporary investment thereof:—

1. The account to be kept by the council of the Consolidated Loans Fund shall be divided into two parts, an income account and a capital account. To the income account shall be credited all interest received by the council on loans granted, and on investments made by them, and all rents, interest, and other annual income received by them into the

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Consolidated Loans Fund; and debited all payments for dividends, interest, rents and all other payments properly chargeable to the income of the Consolidated Loans Fund. To the capital account shall be credited all moneys received by the council (except income) applicable to the payment or redemption of debt, including moneys received by realization of temporary investments of capital money; and debited all moneys paid in redemption of debt, and all temporary investments of capital money. 2. The council may from time to time, as they may think fit, without any further approval of the Treasury, apply any moneys for the time being standing to the credit of the capital account of the Consolidated Loans Fund in (*a*) the purchase and redemption of Metropolitan Consolidated Stock, (*b*) the payment of principal moneys due on any other securities for which the council is liable, (*c*) the temporary investment in any stocks, funds, or securities, except stocks issued by the council itself or by the late Metropolitan Board of Works, in which cash under the control or subject to the order of the Supreme Court may be invested under any order of the Supreme Court for the time being in force. 3. The council may from time to time as they may think fit, without any further approval of the Treasury, sell any stocks, funds, or securities, on which any temporary investment may have been made as aforesaid, and reinvest the proceeds, or any part thereof, in any other of the stocks, funds, or securities, authorized as set forth in the preceding s. 2 (*c*).

In the Divisional Court the Attorney-General did not insist on the charge contained in paragraph 9 of the information. The Divisional Court held that the defendants were only entitled to retain such a proportion of the income tax which they had deducted from the dividends on their consolidated stock as corresponded to the proportion of those dividends which had been paid out of moneys on which income tax under Sched. D had been already paid, and declared that the contention of the Attorney-General as to the mode of arriving at that proportion in paragraph 11 of the information was correct, and they directed that all necessary inquiries should be made and accounts taken for the purpose of ascertaining the

sums for which the defendants were accountable in accordance with the declaration of the Court.

The defendants appealed.

Dec. 4, 5. *Sir E. Clarke, Q.C.*, and *Bosanquet, Q.C.* (*Ryde* with them), for the London County Council. The defendants are entitled under the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, to retain the amount of the deducted tax in respect of so much of the dividends on the consolidated stock as was paid out of profits or gains already brought into charge under Sched. A as well as in respect of so much as was paid out of profits or gains already brought into charge under Sched. D. The words "such tax" in sub-s. 3 mean income tax generally, and are not confined to income tax under Sched. D. "Profits or gains" are the subject of the charge under all the schedules, and the only distinction is between the kinds of property from which they arise. The expression "profits" is used in many places in the Income Tax Acts with relation to the property coming within Sched. A. The titles of the Income Tax Act, 1842, and the Income Tax Act, 1853, speak of them as Acts for granting to Her Majesty "Duties on profits arising from property, professions, trades, and offices": see also the language of the rules under ss. 60–64 of the Act of 1842. The general scheme of the Income Tax Acts was to provide that the duty should, wherever possible, be collected at the source, and at the same time to provide that there should be no payment of the duty twice over on the same profits or gains: see s. 102 of the Act of 1842, which is still law and which provides that, in the case of annual payments payable out of profits or gains brought into charge under the Act, the whole of such profits or gains shall be charged with duty on the person liable to make the annual payment, and that he may deduct the income tax upon the annual payment from it: see also s. 40 of the Act of 1853. There is no reason or justice in confining the meaning of the words "such tax" in the sub-section to income tax under Sched. D. The words must refer either to income tax generally or only to income tax under Sched. D. The latter construction would exclude from the words of the

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sub-section cases in which annuities or other annual payments are charged on subject-matters coming under Scheds. C and E. Therefore, according to that construction, if a person were liable to pay an annuity charged upon a sum invested in Consols, he must deduct the tax from the annuity and account for the amount so deducted to the Crown, and so the same profits would be taxed twice over; whereas, if the annuity were charged upon profits coming within Sched. D, such as dividends on railway stock, the sum deducted under the sub-section could be retained by the person paying the annuity. It is impossible to suggest any reason why there should be a right to retain the sum deducted for income tax upon a payment of interest out of profits and gains which have been already brought into charge under Sched. D, and no such right in the case of a payment of interest out of rent of land which has been already brought into charge under Sched. A. Sect. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, was not intended to interfere with the general scheme of the Income Tax Acts as before mentioned. Its object is shewn by what was said by Lord Watson in *Gresham Life Insurance Society* v. *Styles*. (1) It was passed to meet the difficulty which arose in that case and for the purpose of making it "compulsory upon the persons liable in payment to retain income tax upon their making payment out of the capital which they employ in trade of any interest of money or annuities charged with the tax under Sched. D and not payable or wholly payable out of profits brought into charge to such tax."

The contention of the Attorney-General contained in paragraph 11 of the information is fallacious. It assumes that the amount paid by the county council as dividends on their consolidated stock is partly paid out of income, such as interest on loans or rents received by them, and partly out of moneys in the nature of capital, such as the proceeds of lands sold by them, which form part of the Consolidated Loans Fund. It is submitted that that is not correct, and that the dividends must be considered to be paid out of such part of the fund as repre-

(1) [1892] A. C. 309, at p. 320.

sents income so far as it will go. Take by way of illustration the ordinary case of interest on a mortgage debt. The mortgagor is personally liable on his covenant to pay the interest on the mortgage debt out of any assets he may have, and, on receiving the rents of the mortgaged property, he does not put them into a separate bag, or pay them into a separate banking account; but, when he pays the interest of the mortgage debt, he must be considered to pay it out of the rents of the mortgaged property within the meaning of the Income Tax Acts. The county council are bound by the regulations made by the Treasury to keep accounts so as to shew how much of the Consolidated Loans Fund is capital and how much income. According to the contention of the Attorney-General the amount which the county council might retain under sub-s. 3, and consequently the amount of the charge upon them, would vary according as the Consolidated Loans Fund happened from time to time to contain a greater or less amount attributable to capital. If local authorities happened in one year to have repaid to the council an unusually large amount of loans, or there had been a large sale of land by the council for some reason, the proceeds of which had been paid into the fund, the proportion which they could retain under sub-s. 3 would be diminished. It is submitted that that would be an unreasonable result.

The Attorney-General (*Sir R. E. Webster, Q.C.*), and *Danckwerts*, for the Crown. "Such tax" in s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, refers to the income tax under Sched. D previously mentioned in the section. Two things must be observed. Sect. 24 is not a taxing clause, but merely deals with the machinery of collection. Secondly, the London County Council carry on the business of buying, selling and letting land, and borrowing and lending money; and it is in respect of the business they are so carrying on that their liability to income tax arises. Therefore, the case is not like that of the individual owner of land upon which an annuity is charged. It is no part of the case for the Crown to contend that the tax under Sched. A is not "income tax," but it does not follow, because it is income tax, that it must be intended

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to be dealt with in the same way as the tax under Sched. D. It may be argued that there is no reason why there should be a distinction in this respect between the two schedules, but a taxing Act, like the Income Tax Acts, must be construed according to its language and not on a priori principles. The incidents of, and the mode of assessment and deductions applicable to the tax under Sched. A are altogether different from those which apply to the tax under Sched. D. The tax under Sched. A is assessed on the annual value of property and not on profits or gains. The words "profits or gains brought into charge to such tax" can only apply to Sched. D. Sect. 24 of the Act of 1888 has not made any change in the incidence of taxation. It merely expresses in terms that which by implication was the law previously to its enactment, and expressly makes the amount deducted for income tax out of so much of the interest or annuities as is not paid out of profits or gains already brought into charge under Sched. D a debt from the person deducting it to the Crown. The county council, having borrowed large sums, have to pay interest thereon, and are bound to deduct from the dividends paid by them on their consolidated stock the income tax on those dividends; and the effect of the sub-section is to provide that, except so far as such dividends are paid out of profits or gains already brought into charge to income tax under Sched. D, they must account for the amount so deducted to the Crown. It is by no means clear that the county council are entitled to retain any of the amount deducted by them from the dividends on the ground that the dividends are partly paid out of profits or gains already brought into charge under Sched. D; but, inasmuch as the dividends are paid out of a gross fund partly composed of such profits or gains, it has been thought that there was ground for allowing them to retain a corresponding proportion of the sums deducted from the dividends; but it is contended that there is no right under the sub-section to retain any other portion of the sums deducted. The enacting portions of the Acts of 1842 and 1853 clearly distinguish between the tax in respect of property in land and other subject-matters, and that in respect of "profits or gains": see the schedules of the Income

Tax Act, 1842, and s. 2 and the schedules of the Income Tax Act, 1853. Scheds. A and B respectively impose the charge for and in respect of property in and occupation of lands and to be charged for every 20*s.* of the annual value thereof. Sched. C imposes the charge for and in respect of all profits arising from interest, annuities, dividends and shares of annuities payable out of any public revenue, and to be charged for every 20*s.* of the annual amount thereof. Sched. E imposes the charge for and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty or out of the public revenue of the United Kingdom, and to be charged for every 20*s.* of the annual amount thereof. Sched. D is the only schedule which imposes the tax for and in respect of "profits or gains." In the case of annual payments out of sums payable out of the public revenue the Crown deducts income tax on the whole in the first instance, and there is therefore no reason why any provision should be made in s. 24, sub-s. 3, for cases coming within Scheds. C and E. Sched. A, No. 1, of s. 60 of the Act of 1842 shews that the charge under Sched. A is on the "annual value" of land; it is not a charge on the rent. The rent is only a criterion by which to ascertain the annual value. The tax under Sched. A is not spoken of in the Acts as a tax on profits or gains. If the county council are correct in contending that "such tax" in sub-s. 3 refers to income tax generally, it is difficult to see why the words "under Sched. D" were inserted in the previous part of the section. If the Legislature had meant what the county council contend for, they would have used the words "income tax," not "such tax."

With regard to the proportion which the county council are entitled to retain, the dividends paid by them cannot be considered to be paid entirely out of the annual interest received by them so far as it will go. The Consolidated Loans Fund consists only in part of moneys received by the council for interest, the rest being made up of moneys arising from the sale of land and the other matters mentioned in s. 27 of the Metropolitan Board of Works (Loans) Act, 1869. The payment of the dividends on the consolidated stock is a first charge

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on the whole fund. The obligation imposed by the Treasury regulations on the council to distinguish in their accounts of the fund between the amounts attributable to capital and to income merely has reference to the necessity for obtaining the approval of the Treasury to temporary investments under s. 15 of the London Council (Money) Act, 1889. The county council are not entitled, having regard to the fact that the dividends are a first charge on the whole fund, to say that they are paid only out of that portion of the fund which consists of interest.

The proper mode of estimating the amount of the deducted tax which the council are entitled to retain is to treat the amount of the dividends paid out of the interest paid to the county council by the local authorities as bearing the same proportion to the total amount of the dividends as the amount of the interest paid by the local authorities to the county council bears to the total of the Consolidated Loans Fund.

[They cited *Coltness Iron Co.* v. *Black* (1); *London County Council* v. *Grove.* (2)]

Bosanquet, Q.C., in reply.

Cur. adv. vult.

Dec. 20. A. L. SMITH L.J. read the following judgment:—Two questions arise in this case—the one as to the true construction of s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888; and the other, what, upon the facts proved when applied to this section, is the account to be rendered by the London County Council to the Crown.

The London County Council has a stock, which is called consolidated stock, upon which they pay dividends to the stockholders amounting in round figures to the sum of 1,000,000 of money per annum. By s. 24, sub-s. 3, of the Act of 1888, it is provided that, before the London County Council pays this annual dividend to their stockholders, the council shall deduct the income tax payable thereon under Sched. D—i.e., shall deduct one million of eightpences, and, unless excused (about which hereafter) the council is bound to render an account to

(1) (1881) 6 App. Cas. 315. (2) (1896) 3 Tax Cases, 508.

the Crown of these eightpences, which it has thus deducted, and for this amount the London County Council is made debtor to the Crown. For the payment of these dividends and for the payment of the other expenditure of the London County Council the council has a fund, called the Consolidated Loans Fund, which is fed by the many receipts of moneys which fall in to the London County Council. These receipts consist, amongst others, of rents, of interest upon loans, of profits made by borrowing and lending money, of profits made by purchasing and selling property, and of money raised by the levy of rates. These receipts are placed together into the one fund, which forms the Consolidated Loans Fund. The rents which are received by the London County Council, and which are paid into this fund, amount in round figures to the sum of 100,000*l.* per annum. The interest upon loans which is received by the London County Council, and which is paid into this fund, amounts in round figures to the sum of 500,000*l.* per annum, and the total receipts paid into this fund, including the two sums above mentioned, amount to the sum of about 2,600,000*l.* per annum.

The first question is whether the rents of 100,000*l.* per annum thus received by the London County Council, and which have had the income tax under Sched. A of the Income Tax Act deducted by the tenants before these rents were paid to the county council, fall within the provisions of s. 24 of the Act of 1888; and this depends on the true construction of that section.

By s. 23 of the Act of 1888, under the heading "Income tax," it is enacted that there shall be collected and paid . . . . in respect of all property, profits, and gains, the amounts therein prescribed chargeable under Scheds. A, B, C, D, or E. Sect. 24, so far as is material, is as follows: "Upon payment of any interest of money or annuities charged with income tax under Sched. D" (i.e., upon payment of the annual dividends of 1,000,000*l.* per annum accruing due upon the consolidated stock to the stockholders) . . . . "the person" (i.e., the London County Council) "by or through whom such interest or annuities shall be paid, shall deduct thereout the rate of

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income tax in force at the time of such payment" (i.e., income tax payable under Sched. D), "and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . . and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly." What is the meaning of this? It seems to me plain that primâ facie where a person pays interest or a dividend which is liable to income tax under Sched. D, *that* income tax—i.e., the income tax under Sched. D—is to be deducted by the person paying that interest or dividend, coupled with the obligation of rendering an account to the Crown of the amount so deducted, and for which amount the person deducting that tax becomes a debtor to the Crown. If there were no exception in this section, which there is, the London County Council, in my judgment, would have to render an account to the Crown of the million eightpences which it had deducted before it paid the million of dividend to its stockholders, which deduction would be the income tax payable under Sched. D, and has nothing whatever to do with income tax under Sched. A. But there is an exception, and what is it? It is that the person to account to the Crown is not to deduct the income tax payable under Sched. D (and therefore is excused from rendering an account as to this to the Crown), if the dividend paid to the stockholders is paid out of "profits or gains" already "brought into charge to such tax." What tax? Why, the income tax under Sched. D. This is my reading of this s. 24; and, in my opinion, this section, as I have said, has nothing whatever to do with income tax payable under Sched. A of the Income Tax Acts, whereas the county council argues that it has. It is said by the London County Council that the meaning of s. 24 is that the Crown in no case is to get income tax twice over, and that it would do so if income tax upon the 100,000*l.* of rents is not deducted from the account rendered to the Crown; for, say the county council, the tenants, before they pay their rents to the council, have already deducted the income tax under Sched. A, and paid it to the Crown; and, unless the London County Council is allowed to deduct this income tax from the account to be rendered, the Crown will get income tax twice over. As regards

income tax under Sched. A, this apparently would be so; but where is it enacted in s. 24 that it is not to be so? As regards income tax payable under Sched. D it is so enacted; but I am clear that this section does not embrace income tax payable under Sched. A. It is said that we should read s. 24 in such a way as to make it apply to income tax under Sched. A; but this I cannot do, for the two taxes—i.e., the tax under Sched. A and the tax under Sched. D—are entirely distinct, excepting that they are both taxes upon income, as are the taxes under the Scheds. B, C, and E. The tax under Sched. A is a tax upon the gross annual value of property. The tax under Sched. D is a tax upon "profits or gains"—an entirely different tax from the tax under Sched. A. Whether the Legislature should have enacted otherwise is not for me to say. It suffices to say that it has not done so. The first point, therefore, taken by the London County Council—namely, that in the account it is to render to the Crown it may deduct the tax paid under Sched. A on the 100,000*l.* of rents—in my opinion fails, and I pass on to the next question.

I have already stated of what the Consolidated Loans Fund is composed. It is obvious that, though there is one component part upon which income tax under Sched. D has been deducted before it was received into the fund, to wit, the tax under Sched. D upon the 500,000*l.* of interest received by the council upon loans made by it, on the others no such deductions have been made; for instance, upon the rents, the profits made by buying and selling property, and upon the rates levied by the council. If the London County Council is to escape rendering an account to the Crown of the million of eightpences which it has deducted from the stockholders, it is for it to prove that the million of money paid to the stockholders has been paid out of money which has already paid income tax under Sched. D. Do they prove this? In my opinion they do not; for it is impossible to say out of what moneys which constitute the Consolidated Loans Fund of 2,600,000*l.* they do pay these dividends of 1,000,000*l.* of money annually to their stockholders, whether partly out of the 100,000*l.* of rents which have paid no income tax under Sched. D, or partly out of profits made by borrowing

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and lending money, or partly out of profits made by purchasing and selling property, or partly out of the rates, none of which have paid income tax under Sched. D. If it is to be presumed that no part of the money received from rates and paid into the loans fund, together with the other receipts, was used to pay the one million of dividends, as Williams L.J. thinks should be presumed, though it is a mere presumption, and, in my opinion, not proved, what then? The only effect will be that the loans fund, applicable to the payment of the dividends, will stand, not at 2,600,000*l.*, but at that sum less the amount received from rates, which will alter somewhat the rateable proportion mentioned in paragraph 11 of the information. But this is not the real point in this case, for what was contended for by the learned counsel for the London County Council was that the interest of 500,000*l.* paid to the London County Council was not the only sum in the loans fund which had already paid income tax under Sched. D, but that the 100,000*l.* of rent had also paid the tax under Sched. A, and that this came within s. 24 of the Act of 1888. This I have held not to be so. In my opinion, upon the facts proved, paragraph 11 of the information has been established by the Crown. As the 500,000*l.* of interest received by the council will not pay the million of dividends to the stockholders, it is obvious to me that the dividends, in part at any rate, have been paid out of moneys which had not theretofore paid income tax under Sched. D. I have not to decide whether, if the Crown pushed this case to its extreme limit, the London County Council would have to render an account of the whole of the million eightpences it has deducted from its stockholders; for the Crown does not insist upon this, and asks only for an account less such a rateable proportion as the 500,000*l.* of interest received bears to the whole fund. In my judgment, the London County Council cannot ask for more, and as it is wrong as to this, as also upon the construction of s. 24, sub-s. 3, of the Act of 1888, I think that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. I think the burden is thrown on the London County Council of shewing

that they did apply that part of their consolidated fund which has already paid income tax under Sched. D in satisfaction of their obligation to pay the dividends on the consolidated stock. I think that they might have so appropriated, and would have been fully justified in so appropriating, their funds as to put themselves in a position to prove that they had applied the sum, which has been roughly put at 500,000*l.*, in payment of those dividends, and, if they were in a position to do so, they would be entitled to a deduction of 500,000 eightpences. My difficulty in this case is that they have not proved this apparently upon the facts before us. Whether upon the inquiry which is directed by the Court below they can prove that they have appropriated that sum to the payment of the dividends, or not, I do not know; but it seems to me that our decision in this case is really one stating the principle, and leaving it open to the London County Council to adjust its practice in such a way as to get the full benefit of that principle. What we are now deciding is that they are not entitled to any deduction in respect of that part of the fund which has paid income tax under Sched. A, but that they are entitled to deduction in respect of that part which has paid income tax under Sched. D; but the burden is upon them to shew that they have applied to the payment of the dividends a part of their fund which has already paid income tax under Sched. D; and the proportional principle which is laid down by this judgment is one which, it seems to me, leaves it open to them to effect the proportion in two ways, one by shewing directly that they have applied one specific earmarked sum which has already paid income tax under Sched. D in the payment of dividends, the other by shewing that some part of the whole fund was so appropriated as to render it clear that such part of it was not applied in payment of the dividend on the consolidated stock. So far as they prove either of those two things, I think they effect the proportion, and it may be that the inquiry which is directed by the Divisional Court may result in the proof that is not before us now on that point. Upon the facts before us now, it seems to me that the London County Council having

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the burden upon them of proving an appropriation have failed to do so.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree with the view taken by the other members of the Court as to the construction of this very difficult section—24 (3)—of 51 & 52 Vict. c. 8, and think that "such tax" means income tax under Sched. D, and not income tax generally, and that that portion of the income tax which is a charge on rents under Sched. A is not included in the words "payable out of profits or gains," but is rather in the nature of a property tax, but the meaning of the section is by no means clear.

As to the question what portion of the deduction made by the county council for income tax from dividends paid by the council on stock issued by them in respect of moneys borrowed by them the county council are entitled to retain without accounting to the Crown by reason of such dividends being paid out of profits or gains brought into charge under Sched. D, my view is that the fact that the principal and interest on the stock are secured by a charge on the entire Consolidated Loans Fund does not prevent the county council in the application of that fund paying the dividends out of any specific portion of the fund out of which it lawfully may be paid. Assume that the fund is derived from, say, four sources—say, A, interest on moneys lent by the county council; B, rents payable to the county council; C, prices of lands sold by the county council; and D, moneys coming from the county rate. Why should the fact that the principal and interest on the stock issued by the council are charged on a fund made up as above prevent the council in the application of the fund paying the dividend out of constituent item A in so far as that item is sufficient for the purpose? It is said that the stockholders to enforce their charge could get a receiver appointed for the whole fund. I do not see that this makes any difference provided the fund yielded sufficient to pay all the charges in due course. It seems to me, therefore, that it is open to us to consider whether there is any proof that the dividends were in fact paid out of rents or profits

already brought into charge—that is to say, in the example taken, out of constituent item A.

Now in my judgment if there is any law, regulation, or fact which makes it the duty of the county council in the application of the fund to pay the dividends out of a specific constituent item going to make up that fund, the county council are bound so to apply the fund unless so to do would be inconsistent with the paramount charges of the stockholders, and in the absence of evidence to the contrary all payments made by the council would be presumed to have been made in accordance with the duty arising on the law, regulation, or facts as the case may be. This in my judgment would be sufficient proof of payment out of the particular constituent item.

Now let us see whether we find any law, regulations, or facts governing the application of the Consolidated Loans Fund, and making it the duty of the council to pay dividends out of constituent item A as far as it will go.

In the first place we find that the borrowing of money by the county council is controlled and governed by the Metropolitan Board of Works (Loans) Act, 1869, and that by s. 5 of that Act stock created for the purposes of the Acts shall be charged indifferently on the whole of the lands, rents, and property belonging to the board, and that all moneys required for the payment of dividends on such stock and for the redemption of such stock (that is to say, the deficiency after taking into account the lands, rents, property, moneys, and fund) shall be raised out of the improvement fund and consolidated rate. The Act goes on to say how the rate shall be raised, and says that every precept shall specify, first, the proportion of the amount named in the precept required for the purpose of paying (inter alia) the dividends on and the sums required for the redemption of consolidated stock under the Act. I am clearly of opinion that we here find a duty binding on the county council not to apply in the payment of dividends that amount which is named in the precept as being required for redemption or the amounts therein mentioned as being required for specified capital payments. Then we come to s. 15 of the Act of 1889, which says that the Consolidated Loans Fund shall

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be first applied in the payment of dividends and in the redemption of stock, and then in the payment of certain specified debts charged on the fund. There is nothing in this to make either the dividends or any of the specified payments payable out of one constituent item more than another, but the regulations in force in 1897 under s. 15 of the Act of 1889 with respect to the application of the Consolidated Loans Fund provide that the account to be kept by the council of the Consolidated Loans Fund shall be divided into two parts—an income account and a capital account.

It is plain from these regulations that the dividends must be paid out of the receipts of the income account—that is to say, out of interest received by the council on loans and rents and other annual income. Besides the dividends there is payable out of these receipts, interest, rents or other payments properly chargeable to income, but these are a very small matter. Redemption and other capital payments are to be paid out of the capital account—that is to say, moneys received by the council (except income) applicable to the payment or redemption of debt, including moneys received by realization of temporary investments of capital.

Now, applying these rules of payment, it seems to me that, although paragraph 11 is generally right in principle, it is wrong in so far as it treats the whole Consolidated Loans Fund as the factor to which the amount of the interest payable by the local authorities must bear a rateable proportion. The sum to which the interest payable by the local authorities must bear a rateable proportion is so much of the Consolidated Loans Fund as is properly carried to the receipts of the income account. This may or may not be an important matter when the figures are examined, but it is important as shewing that the Attorney-General was right in law in abandoning paragraph 9 of the information, which charged that none of the said dividends are by law payable out of profits or gains brought into charge to the income tax under Sched. D. The suggestion made in argument that the Crown, in abandoning clause 9, abandoned the strict rights of the Crown, seems to me, I am happy to say, quite unnecessary and untenable, for I do not

think that any one would have had the right to make such a concession in favour of the county council or any other subject.

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Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *Blaxland.*

E. L.

[IN THE COURT OF APPEAL.]

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KNIGHTS DEEP, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp Duty—Company—Debenture—Redemption on Contingency—"Marketable Security"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

A limited company issued a series of debentures for 100*l.* each, redeemable at par by annual drawings on and after July 1, 1902. Each debenture contained a stipulation that the company might, at any time after July 1, 1900, on giving six months' previous notice in writing to the registered holder, redeem the debenture at 103*l.*, which sum, at the expiration of the six months, should become payable as if the same were the amount of the principal moneys thereby secured:—

Held, that ad valorem stamp duty was chargeable on each debenture under the head of "Marketable Security" in the 1st schedule to the Stamp Act, 1891, upon 100*l.* only, as being the "money secured" by the debenture within the meaning of the schedule.

Decision of the Divisional Court, [1899] 1 Q. B. 345, reversed.

APPEAL from the decision of a Divisional Court in favour of the Crown on a case stated by Commissioners of Inland Revenue; reported [1899] 1 Q. B. 345.

On October 8, 1898, a debenture of the same date was presented on behalf of the issuers thereof, the appellants, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The following (so far as material for the purposes of this report) is a copy of the instrument in question:—

"No. 1641. First Debenture. 100*l.*

"The Knights Deep, Limited.

"Incorporated under the laws of the South African Republic.

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Share Capital 550,000*l.*, divided into 550,000 shares of 1*l.* each. Issue of 400,000*l.* debentures in 4000 debentures of 100*l.* each, carrying interest at the rate of 5*l.* 10*s.* per cent. per annum.

"For valuable consideration already received the Knights Deep, Limited (hereinafter called the company), will, as and when the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the Simmer & Jack Proprietary Mines, Limited, or other the registered holder for the time being hereof, the sum of 100*l.*

"The company will, in the meantime until such payment, pay interest thereon at the rate of 5*l.* 10*s.* per cent. per annum by half-yearly payments on every first day of July and first day of January.

"This debenture is issued subject to the conditions endorsed hereon, which are to be deemed part of it.

"The conditions within referred to.

"1. This debenture is one of a series of debentures of the company for securing principal sums amounting in the aggregate to 400,000*l.*, carrying interest at the rate of 5*l.* 10*s.* per cent. per annum, and they are all to rank, pari passu, in point of charge without any preference or priority one over another."

"3. The registered holder or his legal representative will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"4. Every transfer of this debenture must be in writing under the hand of the registered owner or his legal personal representatives. . . .

"5. Debentures of the nominal value of 26,600*l.* will be redeemed by the company on July 1, 1902, and on each succeeding 1st of July up to and including July 1, 1917, when the balance then outstanding shall be redeemed."

"9. The particular debentures to be redeemed will be determined by annual drawings, which the company will cause to

be made at its branch office in London for the time being, or at such other place as the company may from time to time determine."

"17. The company may at any time after July 1, 1900, redeem this debenture at 103*l.*, on giving six calendar months' previous notice in writing so to do to the registered holder, ... and upon the expiration of such notice the said sum of 103*l.* shall become payable as if the same was the amount of the principal moneys hereby secured, and shall thereupon cease to carry interest. . . ."

The appellants are a foreign company, and the debenture was made and issued by them in the United Kingdom, and was capable of being sold on a stock market in the United Kingdom. Under these circumstances it was admitted that the debenture fell within Division (*b*) of the following head of charges in the 1st schedule of the Stamp Act, 1891, namely: "Marketable Security . . . . (*b*) being a security not transferable by delivery . . . . .

For or in respect of the money thereby secured.	The same ad valorem duty according to the nature of the security as upon a mortgage."

The commissioners were of opinion that "the money thereby secured" within the meaning of the said head of charge was the sum of 103*l.*, and accordingly assessed the instrument as liable to a duty of 3*s.* 9*d.*, being the duty payable on a mortgage of that amount.

The company, contending that the money secured by the debenture was 100*l.* only, and that the duty chargeable was 2*s.* 6*d.*, required the commissioners to state this case.

The questions for the opinion of the Court were:—

1. Whether the instrument was chargeable with the duty of 3*s.* 9*d.* in accordance with the assessment of the commissioners.

2. If not, with what duty the instrument was chargeable.

The Divisional Court (Wills and Bruce JJ.) gave judgment for the Crown. (1)

The Knights Deep, Limited, appealed.

(1) [1899] 1 Q. B. 345.

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Joseph Walton, Q.C., and *Scrutton*, for the company. The 3*l.* agreed to be paid for the privilege of departing from the normal scheme for the payment off of the debentures is not "money secured" by the debenture. It is a payment by way of liquidated damages for depriving the debenture-holder of the right to interest until the debenture should be paid off in ordinary course. If this 3*l.* were payable as extra interest for the last year of the currency of the debenture, that amount could not be taken into consideration as part of the "money thereby secured." *Rowell* v. *Inland Revenue Commissioners* (1) was a different case from the present, for there the company contracted to pay not merely the face value of the debenture, but also the premium at a specified date. The dictum of Vaughan Williams J. in that case covers the present one.

This debenture does not come within the definition of mortgage in s. 86 of the Act.

Sir R. B. Finlay, S.-G., and *Danckwerts*. The 3*l.* is money payable on a contingency, and is properly to be taken into consideration in estimating the duty. This debenture covers a payment of 103*l.* under certain circumstances, and directly notice is given it becomes a security for that amount for the whole of the six months covered by the notice. Under clause 17 of the conditions the 103*l.* in that case becomes the principal moneys secured, and the sum in respect of which stamp duty is payable when the document is created and requires to be stamped: *Dickson* v. *Cass*. (2)

[They cited also *Canning* (*Viscount*) v. *Raper* (3), and *City of London Brewery Co.* v. *Inland Revenue Commissioners*. (4)]

A. L. SMITH L.J. With all submission to the learned judges in the Court below, I cannot think that they have arrived at a right conclusion.

The point to be determined arises under the schedule to the Stamp Act, 1891. Under the heading "Marketable Security," within which it is admitted that this debenture comes, we find

(1) [1897] 2 Q. B. 194.
(2) (1830) 1 B. & Ad. 343.
(3) (1852) 1 E. & B. 164.
(4) [1898] 1 Q. B. 408; [1899] 1 Q. B. 121.

"(*b*) a security not transferable by delivery," and the amount of the stamp "for or in respect of the money thereby secured" is "the same ad valorem duty, according to the nature of the security, as upon a mortgage."

Now, this debenture on the face of it is given to secure 100*l.* and no more. That appears on the debenture itself, at the head of which there is 100*l.*; there is mention of debentures of 100*l.* each, and the company are to pay to the registered holder 100*l.* But the question arises whether, under paragraph 17 of the conditions indorsed on it, the debenture is to secure not 100*l.*, but 103*l.*

By paragraph 17 the company may—that is, they may or may not, just as they think fit—after July 1, 1900, redeem the debenture at 103*l.* on giving six months' notice to the registered holder; and, upon the expiration of the notice, the sum of 103*l.* is to become payable as if it were the amount of the principal moneys secured. This gives the obligors—that is the company—the option if they like, and only if they like, for nobody can compel them to exercise the option, of paying off the debenture before the time stipulated in it, i.e., between July 1, 1902, and July 1, 1917—that is, it gave them the option of paying off the debenture two years at least before they would otherwise have to pay them off.

Now, I ask myself, not what the debenture may cover, but, what does it secure? It seems to me that it only secures 100*l.*, because the obligors need never, except at their own pleasure, exercise the option, and if they do not the holder would only get 100*l.*, and not 103*l.* My brother Wills in his judgment dealt with the judgment of my brother Vaughan Williams in *Rowell* v. *Inland Revenue Commissioners.* (1) It seems to me that the judgment was perfectly right, because when the case is looked at it appears that a company issued a series of debentures of 100*l.* each with an undertaking to pay to the registered holder upon a specified date 100*l.*, together with a premium thereon of 7*l.* 10*s.*; and the Court held, and quite rightly, that the amount secured by the debenture was 107*l.* 10*s.* My

(1) [1897] 2 Q. B. 194.

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brother Wills, in his judgment in this case, says: "If there were no absolute covenant to pay the 3*l.* in a certain event, but only a stipulation that if the company chose to pay the 3*l.* they were to have the privilege of paying off the principal, should they be called upon to do so, the case would be different." But where is the certain event in this case? The event is entirely dependent on the will of the obligors. It seems to me that the passage I have quoted quite covers this case in the shortest possible phraseology; but in spite of that the learned judge decided that 103*l.* was the amount on which duty should be paid. I cannot follow that conclusion, and it seems to me that the stamp duty which should be paid is 2*s.* 6*d.*, and not 3*s.* 9*d.*

For these reasons I think the appeal must be allowed.

COLLINS L.J. I am of the same opinion, and, though we are differing from the decision of the learned judges in the Court below, I think we are really giving effect to the true opinion of Wills J., because in my view this case comes within the class of cases which he describes at p. 351 of the report. Therefore I claim the authority of Wills J. in support of the decision which I am about to give. When the case is stripped of what I may call fringe in the nature of machinery, it comes to this—that there is no contract to pay 3*l.* over and above the 100*l.* except at the option of the obligors. It is true that when they exercise that option they must comply with certain formalities, but whether they conform to those formalities or not is equally a matter entirely within their option, and they are under no obligation in the matter. The 3*l.* seems to me to be simply a liquidated sum which they undertake to pay if they think it worth while to pay off the debenture, and thereby deprive the bondholder of the right to receive the current interest for the time stipulated in the debenture. It shortly comes to this—that the debenture cannot be said to be a security for anything which is only payable at the option of the obligors, and when we get at the real facts of the case that is the whole obligation undertaken with respect to the 3*l.* as distinguished from the 100*l.*

VAUGHAN WILLIAMS L.J. I agree. The 3*l.* is a premium payable for the exercise of the option to pay off the sum secured before the time limited for payment arrives. It is no part of the sum secured, and the presence of this option does not alter the amount of that sum.

Appeal allowed.

Solicitors for appellants: *Julius & Thomas.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL *v.* DE PRÉVILLE.

Revenue—Estate Duty—Settled Property—Property passing on Death—Interest ceasing on Death—Surrender of Life Interest to Remainderman—Death of Life Tenant within Twelve Months—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 7, *sub-s.* 7.

Where the tenant for life of settled property has released the life interest in favour of the remainderman and dies within twelve months of such release, estate duty is not payable by the remainderman on the principal value of the property under s. 2, sub-s. 1 (*c*), and s. 7, sub-s. 7, of the Finance Act, 1894.

Judgment of the Divisional Court, [1899] 2 Q. B. 238, reversed.

APPEAL from a judgment of a Divisional Court in favour of the Crown, on an information by the Attorney-General; reported [1899] 2 Q. B. 238, where the case is set out.

By an indenture of settlement dated October 10, 1845, certain freehold messuages, lands, and hereditaments therein described, were limited to trustees in trust for Georgiana A. R. de Préville, then Georgiana A. Mowbray, for life, and after her decease to the use of her first and other sons successively according to seniority in tail male.

George Thomas Mowbray, by his will dated February 4, 1892, devised and appointed all the real estate to which he should be entitled at the time of his decease, or over which he

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might have any disposing power, to the use of his sister Georgiana A. R. de Préville for her life, and after her decease to the use of his nephew, the defendant André George Richaud de Préville and the heirs of his body. George Thomas Mowbray died on February 29, 1892.

By an indenture dated February 5, 1896, and made between Georgiana A. R. de Préville, widow, of the first part, the defendant of the second part, and David Hale of the third part, reciting (inter alia) the indenture of settlement of October 10, 1845, and the will of G. T. Mowbray and his death, and reciting that the defendant was the only son of Georgiana A. R. de Préville, and that they were desirous of barring the estate tail of the defendant in the hereditaments comprised in the settlement and devised by the will, and of limiting the hereditaments as thereinafter expressed to the intent that the life estate of Georgiana A. R. de Préville therein should be absolutely released in favour of the defendant. It was witnessed that Georgiana A. R. de Préville as settlor and the defendant (with the consent of the said Georgiana A. R. de Préville as protector of the settlement and will) thereby granted unto David Hale, first, all the hereditaments comprised in the indenture of October 10, 1845, and, secondly, all the freehold messuages and hereditaments devised by the will of G. T. Mowbray. To hold the same unto the said David Hale and his heirs discharged from all estates in tail male or in tail of the defendant at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail. To the use of the defendant, his heirs and assigns, for ever, absolutely released and discharged from the life estate therein of Georgiana A. R. de Préville. And it was by the indenture now in statement also witnessed that Georgiana A. R. de Préville thereby absolutely released unto the defendant, his heirs and assigns, all powers by the indenture of October 10, 1845, given to or vested in her, to the intent that the same powers should thenceforth be absolutely extinguished and cease to be exercisable.

The lastly-stated indenture was enrolled in the Central

Office of the Supreme Court of Judicature on February 11, 1896.

Georgiana A. R. de Préville died within twelve months after the execution of the said indenture (namely) on December 11, 1896, intestate. Letters of administration to her personal estate were granted to the defendant from the Principal Registry of the Probate Division of the High Court of Justice on August 9, 1897.

It was contended that on the death of Georgiana A. R. de Préville estate duty under ss. 1 and 2 of the Finance Act, 1894, became payable in respect of the hereditaments and property comprised in the indenture of February 5, 1896 (or, alternatively, in respect of the life interest at the date of the last-mentioned indenture of Georgiana A. R. de Préville in the hereditaments and property), as property passing on her death within the meaning of the said Act. The Commissioners of Inland Revenue caused application to be made to the defendant to account for and pay such estate duty, but the defendant refused to do so, and contended that no estate duty had become payable in respect of the property or of any interest therein. The informant charged that this contention was not well founded.

The Divisional Court (Day and Lawrance JJ.) gave judgment in favour of the Crown.

The defendant appealed.

1899. Dec. 12. *Butcher, Q.C.*, and *Ashton Cross*, for the defendant. Where a life estate is surrendered to a remainderman, nothing passes on the subsequent death of the life tenant, but the question arises whether anything can be deemed to pass under the provisions of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. That clause is only applicable to property which would have been subject to account duty. Sect. 38 of the Customs and Inland Revenue Act, 1881, was aimed, not at such things as the surrender of a life estate to a remainderman, but at absolute voluntary gifts, such as was the case in *Attorney-General* v. *Booth*. (1) The surrender of the life

(1) (1894) 63 L. J. (Q.B.) 356.

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interest takes effect at the date of the surrender, and not at the date of the death of the life tenant, so that the life interest could never have got into the account and cannot be valued for probate. The value must be taken at the date of the death of the deceased (s. 7, sub-s. 5, of the Act of 1894), and at that date the value of the life estate is nil. The utmost that the Crown are entitled to would be estate duty on the actuarial value of the life estate, and not to estate duty on the principal value of the estate itself.

[They cited *Attorney-General* v. *Beech* (1) and *Cowley* (*Earl*) v. *Inland Revenue Commissioners.* (2)]

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *The Solicitor-General* (*Sir R. B. Finlay, Q.C.*), (*Vaughan Hawkins* with them), for the Crown. *Cowley* (*Earl*) v. *Inland Revenue Commissioners* (2) has no bearing, because it is not contended that this case comes within s. 1 of the Finance Act, 1894. It is admitted that the case must be brought within the Customs and Inland Revenue Acts, 1881 and 1889; but there is no limit to the class of property which is to be subject to account under those Acts, for their effect was to bring in property not previously chargeable. It cannot be contended that a life estate is not property. The existence or non-existence of the life estate, at the time the account is taken, cannot be the test of whether it can be brought into account, for, taking the case of a gift of money within twelve months of the death of the donor, whether it exists or not, that is, whether the donee has spent it or not, it is brought into the account.

Butcher, Q.C., in reply. The effect of the Acts of 1881 and 1889 was not to bring in property not previously chargeable, but to bring in property that might have paid duty had it not been parted with.

Cur. adv. vult.

Dec. 20. A. L. SMITH L.J. read the following judgment:— The real point upon which the decision of this case turns is whether s. 2 of the Finance Act, 1894, imposes estate duty upon a life estate which, prior to the passing of that Act,

(1) [1899] A. C. 53. (2) [1899] A. C. 198.

would not have had to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, upon the death of the tenant for life. The facts are short. On and prior to February 5, 1896, Georgiana Anne de Préville was tenant for life of real property situate in the county of Leicester, of which her son, the present appellant, was tenant in tail, and upon the day above named the mother and son executed a disentailing deed, by which the estate tail was barred, and the son thereupon became owner in fee of the property. On December 11, 1896, ten months after the execution of this deed, the mother died. The question is whether the life estate of the mother, which had passed to her son ten months before her death, is liable to estate duty upon her death.

It has been held in this Court, affirmed in the House of Lords in the *Attorney-General* v. *Beech* (1), that where the owner of a life estate has conveyed that estate to a donee more than twelve months before the death of the donor, estate duty upon the life estate is not payable by the donee upon the death of the donor, for the reason that by the Finance Act it is only the estate which passes upon death which is liable to estate duty, and that when the donor, the tenant for life, died nothing passed upon which the estate duty could operate, for the life estate had already passed to the donee before the death of the donor. It is now said by the Crown that that decision does not apply, because in the present case the tenant for life died within twelve months of the gift, and not after twelve months of the gift, as in the former case, and it is argued that upon this ground, by reason of the provisions of the remarkable s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, this case is different from *Beech's Case* (1), and that estate duty is leviable upon the life estate upon the death of the tenant for life. The Crown admits that if s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, does not impose this duty upon the life estate upon the death of the tenant for life, there is no other section which does. Sect. 2, sub-s. 1 (*c*), is as follows: "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased

(1) [1898] 2 Q. B. 147; [1899] A. C. 53.

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to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." In the case of *Attorney-General* v. *Earl Grey* (1) I expanded this composite section, and I will do so again so far as material to this case. It then reads as follows: "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, which, as amended, enacts that real or personal property to be included in an account shall be property of the following description—viz., any real or personal property taken under a disposition made by a person dying on or after June 1, 1881, purporting to operate as an immediate gift inter vivos, which shall not have been bonâ fide made twelve months before the death of the deceased." This s. 38 of the Act of 1881 is one of a group of sections under the heading "Stamps" which relates to the taking out of probate and letters of administration to the estate and effects of deceased persons—i.e., of property which deceased persons die possessed of, or leave behind them, and it seems to me that this group of sections has nothing to do with property a deceased person has not left behind him, excepting cases in which a deceased person would have left property behind him had he not given it away before he died. It is only as regards such cases that an account is to be rendered. Sect. 38 being one of the sections in this group, what is its true reading? Does it mean that a life estate—which of necessity comes to an end on the death of the tenant for life, and which never under any circumstances can come into an account upon the death of the tenant for life—is nevertheless to be brought into an account if the deceased has given it away less than twelve months before death, or is its true reading that, if there be property which would come into an account upon death if it

(1) [1898] 2 Q. B. 534.

had not been given away, that property must be brought into an account if the deceased has given it away less than twelve months before death? Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or would have died possessed if they had not given it away, in my opinion it is not the true reading of s. 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within twelve months of the death. It is only to be brought into an account if it would have had to be so brought but for the gift. In my judgment this section is to prevent persons giving away property less than twelve months before death which otherwise would have to be included in an account, and thus escape the duty. It is not disputed by the Crown that the life estate in the present case could never have been included in an account, for upon the death of the owner of this life estate, even if it had not been given to the son, it ipso facto came to an end, and there was therefore nothing whatever to bring into an account.

For these reasons s. 2, sub-s. 1 (*c*), in my judgment does not bring about what is contended for by the Crown, and, as before stated, there is no other section which does so. I need not discuss the case of *Cowley* (*Earl*) v. *Inland Revenue Commissioners* (1), for it has no bearing upon the point I have to decide, and I think the Crown is wrong. I cannot agree with the Divisional Court, though upon what ground that Court decided in favour of the Crown I do not know, for it has not told us. I think this appeal must be allowed.

COLLINS L.J. I regret very much that the Divisional Court has not given any reasons for its decision in this case, for I must confess that I have had very serious misgivings as to whether the property in question does not come within the express words of s. 38 of the Act of 1881, and therefore in a taxing Act must be held liable. It seems to me that primâ facie the life estate here is property, and it was taken under "a

(1) [1899] A. C. 198.

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voluntary disposition made by a person, purporting to operate as an immediate gift inter vivos, by way of transfer, delivery, declaration of trust, or otherwise." It seems to me primâ facie to come within those words; and if so, in construing a taxing Act, we should not be justified in applying what may be regarded as the general spirit of the Act as against the express words of the section. My misgiving is whether the Act may not have done this—have enacted that if any person chooses in his lifetime to give away that which would not have survived his death had he not given it away, he must do it at the risk of estate duty having to be paid upon it if he dies within twelve months of the gift. Had he sold his interest in his lifetime, and given away the proceeds, and died within twelve months, the sum realized must have been brought into the account. Has he not in a sense realized its value if he gives it away? My difficulty has been dealt with in the judgment which has been just delivered, and is more fully dealt with in the judgment of my brother Vaughan Williams, which I have had the advantage of seeing; and I am content to adopt the reasoning of those judgments on the point, and to agree in the decision pronounced by the other members of the Court.

VAUGHAN WILLIAMS L.J. read the following judgment:—The decision in this case depends, it seems to me, upon the meaning of the word "property" in s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881. Does property there mean any property, irrespective of the interest of the deceased therein? Or is it limited to property in which the deceased had an interest which by its nature might continue after the death of the deceased, i.e., property capable of devolution as estate of a deceased, or, in other words, an interest not limited to determine with the life of the deceased? Now Lord Cairns, in *Partington* v. *Attorney-General* (1), says, speaking of the construction of revenue statutes: "As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to

(1) (1869) L. R. 4 H. L. 100, at p. 122.

be. . . . In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." On the other hand, a taxing Act is to be construed upon the same principle and by the same rules as any other Act: *Mersey Docks* v. *Lucas* (1), per Brett L.J. For instance, I suppose that, if upon the ordinary rules of construction general words would be limited on the ejusdem generis doctrine by preceding particular words, this construction would be applied in a taxing statute equally with any other statute. Now in the present case there is nothing to be found in the statute itself limiting the ordinary legal meaning of the word "property"; but the statute refers to antecedent legislation—that is to say, to the statutes beginning with 55 Geo. 3 and coming down to 43 Vict. c. 14, granting the Crown certain duties in respect of the value of the estate and effects of deceased persons, and provides for an inventory or account being made by the executor or administrator of such estate and effects, and s. 38 deals with what shall be included, and says in effect that it shall include not only property forming part of the estate and effects of the deceased at his death, but also property which he has parted with within three (now twelve) months before his death. Now, must not this mean, according to the ordinary rules of construction, property of the same kind as that dealt with in the antecedent legislation? That is to say, property in which the deceased had such an interest that, if he had not parted with it by a gift within twelve months before his death, it would have been estate and effects of a deceased, and therefore have been included in the property on the value of which the duty was granted? It is clear in the antecedent legislation that no duty was granted in respect of property the interest of the deceased in which terminated with his life, for the duty was in respect of property as being estate and effects of a deceased; and must not the word "property" in subsequent legislation be read in the same sense? On the whole I think it must, and I find nothing in the Finance Act generally or in s. 2, sub-s. 1 (*c*), to enlarge the sense in

(1) (1881) 51 L. J. (Q.B.) 114, at p. 118.

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which the word "property" is used in the probate duty legislation and the account to be rendered thereunder. The Probate Duty Acts prior to 1881 dealt with property capable of devolution as part of the estate and effects of a deceased at death; for it dealt with property which in fact devolved as such estate at death. Then comes the statute of 1881, which says that the tax shall apply to property which does not in fact devolve at death, but, shortly before death, is transferred by what purports to be a gift inter vivos, but which property, the statute says, shall be taxed in the same manner as property in fact devolving at death. Surely, according to the ordinary rules of construction, the word "property" in the statute of 1881 must be limited to property in its nature capable of devolution as part of the estate and effects of a deceased. Thus to construe the word "property" in sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is only to apply the ordinary rule of construction, that words in the same and in cognate connected Acts must be presumed to have the same meaning.

Appeal allowed.

Solicitor for informant: *The Solicitor of Inland Revenue.*

Solicitors for defendant: *Kingsford, Dorman & Co., for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouch.*

A. M.

[IN THE COURT OF APPEAL.]

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Dec. 13.

GRANT *v.* THE GOLD EXPLORATION AND DEVELOPMENT SYNDICATE, LIMITED.

Vendor and Purchaser—Agreement by Vendor to pay Commission to Purchaser's Agent—Non-disclosure of Agreement by Vendor—Right of Purchaser to recover Commission from Vendor.

The plaintiff, who was the owner of a mine, agreed with a person who was in fact, though the plaintiff did not then know it, a director of and agent for the defendants, a limited company, that the director should have an option of finding a purchaser for the property, and should, if successful, be paid as commission 10 per cent. of the price obtained. The director arranged a sale to the defendants, but before the contract was entered into, or the commission had become payable, the plaintiff became aware of the director's position with regard to the defendants:—

Held, that, the plaintiff having completed the contract without disclosing to the defendants, as purchasers, the agreement to pay commission to their agent, any part of the agreed commission remaining in the plaintiff's hands could be recovered from him by the defendants.

Per Collins L.J.: The money could be recovered from the plaintiff as money had and received to the defendants' use.

By a second agreement between the plaintiff and the director, made before the commission became due, an immediate payment of a sum less than that originally agreed on was substituted. The defendants subsequently discovered the existence of the two agreements as to commission, and the payment to the director, and they demanded of and received from him, in satisfaction of all claims against him, the amount he had received from the plaintiff:—

Held, that the defendants were not bound by the agreement as to the reduction of the amount of commission, and that, notwithstanding that agreement and their receipt from the director of the reduced amount of the commission, they were entitled to recover the balance from the plaintiff.

APPEAL from a judgment of Bigham J. at the trial of the action without a jury.

The action was brought to recover the balance of a promissory note made by the defendants under the following circumstances. The plaintiff was the owner of certain mineral rights in British Columbia, and in August, 1896, he there met one Govan, who was then a director of the defendant syndicate,

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and had gone there for the purpose of buying mining properties on behalf of the syndicate. Negotiations took place which resulted in the plaintiff giving to Govan a commission note, dated September 26, 1896, which (omitting immaterial facts) was as follows: "I agree to give you an option on my mineral claims for six months to enable you to deal with the properties with the object of forming one or more limited liability companies on the London market. You agree to use your best endeavours with regard to the successful flotation of such company or companies on terms to be hereafter discussed and settled between us, and I agree to hand you on any such successful flotation 10 per cent. on all sums whether received in cash or shares accruing to me." At the time the plaintiff gave this note to Govan he was not aware that Govan was acting for any principal. Govan returned to England, and at his request the plaintiff came over for the purpose of effecting a sale. The terms of sale were discussed between them, and the price fixed was 25,000*l.* in cash and 115,000*l.* in fully paid-up 1*l.* shares of the company to be formed. After the price was fixed, and before any contract for the purchase of the property was entered into, the plaintiff became aware that Govan was a director of the defendant syndicate. On January 8, 1897, a contract was concluded between the plaintiff and the defendants whereby they purchased the plaintiff's mineral rights at the price above named. The defendants thereupon formed and floated a new company, and 115,000 of its 1*l.* shares were allotted to the plaintiff, but of these 10 per cent. were at the plaintiff's request put in the name of a Mr. Allingham, and this allotment was accepted by Govan as payment of so much of the commission as was to consist of shares. The defendants then paid 10,000*l.* as part of the cash due to the plaintiff on the purchase. In March, 1897, before the balance became due, the plaintiff asked Govan to endeavour to persuade the defendants to pay 5000*l.* of the balance in cash at once, and the remainder by a promissory note. This Govan undertook to do, but he stipulated that if he succeeded his cash commission should be paid out of the money to be received by the plaintiff. To this the plaintiff agreed, with the term that the cash com-

mission which would otherwise be 2500*l.* should be reduced by 500*l.* The agreement so made was put into writing and signed by both parties on March 17, 1897. Shortly afterwards, the defendants having agreed to pay to the plaintiff 5000*l.* in cash at once and to give a promissory note at four months for the balance of 10,000*l.*, paid 5000*l.* to the plaintiff in two instalments, and on each occasion the plaintiff drew a cheque for 1000*l.*, for which he obtained bank-notes, which he handed to Govan, who had accompanied him to the bank. Half of the amount of the promissory note was paid by the defendants when the note matured, and a new note for the remaining 5000*l.* was given. While this note was current the defendants learned that the plaintiff had paid Govan a commission, and they appointed a committee to inquire into the matter. The result was that Govan on the demand of the defendants paid over 2000*l.* to them, and the 11,500 shares were transferred to them; and, by resolution of the board of directors, the payment and transfer were accepted in full satisfaction of the claims of the defendants against Govan. Subsequently the directors came to the conclusion that the defendants were entitled to the 500*l.*, the balance of the commission originally agreed upon between the plaintiff and Govan, and they claimed to deduct this amount from the balance of the purchase-money due to the plaintiff. On this action being brought to recover that balance the defendants paid the amount into court less 500*l.*, for which they also counter-claimed.

The learned judge decided that when the plaintiff ascertained Govan's true position he should have paid the commission into the hands of the defendants, and had no right to pay it to Govan, or to make the arrangement by which the amount of the commission was reduced; but that as the defendants, knowing all the facts, had elected to treat their rights as being defined by the second agreement reducing the commission, they were bound by the terms of that agreement, and must treat the original commission agreed on as reduced by 500*l.* He therefore gave judgment for the plaintiff for the full amount of his claim, and also judgment for the plaintiff on the counter-claim.

The defendants appealed.

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Nov. 29. *Rufus Isaacs, Q.C.*, and *T. W. Chitty*, for the defendants. Where there is an agreement by a vendor to give a commission to the purchaser's agent behind the back of the purchaser, the presumption is that the price of the property sold is swollen by the amount of the commission; and the real purchase-money must be taken to have been the price minus the commission. Therefore the 500*l.* which was taken off the commission must be considered as money of the defendants in the hands of the plaintiff. The defendants had a right to any secret commission due to their agent, and could not be deprived of that right by any agreement made between him and the plaintiff behind their backs. The learned judge in the Court below gave judgment for the plaintiff on the ground that the defendants, having received from Govan the 2000*l.* paid him under the agreement by which the commission was reduced to that amount, and so having taken the benefit of that agreement, were estopped from repudiating it and treating the commission as exceeding that amount. It is submitted that that view of the case is fallacious. The fact that the defendants recovered from their agent what he took by way of secret commission, as they were entitled to do, could not prevent their recovering from the plaintiff an amount paid to him in excess of what must be taken to have been the real purchase-money of the property.

Duke, Q.C., and *Kerly*, for the plaintiff. Neither at law nor in equity have the defendants a right to recover the sum claimed. It is true that, if a vendor in collusion with the purchaser's agent corruptly agrees to increase the purchase-money and to give the amount by which it is increased to the purchaser's agent as a commission, i.e., in point of fact as a bribe, the purchaser can recover that amount from the vendor in an action for fraud or conspiracy with the agent to defraud the purchaser. But it is submitted that the existence of moral fraud is in such a case essential to the cause of action: *Salford Corporation* v. *Lever* (1); *Lands Allotment Co.* v. *Broad.* (2) In this case there is nothing to shew such fraud on the part

(1) (1890) 25 Q. B. D. 363; [1891] 1 Q. B. 168.

(2) (1895) 2 Manson's Bky. Cas. 470.

of the plaintiff. It is well settled that a principal may recover from his agent any secret commission or profit which the latter has received in fraud of his principal, but it is submitted that that right depends upon the fiduciary relation between the vendor and purchaser. There was no fiduciary relation between the plaintiff and the defendants: *Lands Allotment Co.* v. *Broad.* (1) The plaintiff never made any fraudulent agreement with Govan. At the time when the plaintiff agreed to give the commission to Govan he was not aware that Govan was acting as agent for any one else, but thought that he was to act on his behalf; and there was therefore nothing fraudulent or dishonest on the plaintiff's part in the agreement to give the commission. Even if he had known that Govan was the defendants' agent, an agreement by a vendor to give a commission to the purchaser's agent is not necessarily fraudulent, provided there is no concealment, and it is not given as a bribe to the agent. There is no presumption of law as suggested that the amount of the commission is added on to the purchase-money, and there was no evidence to shew that to have been so in fact here. A vendor may be content to take less than the utmost value of the property in order to secure a purchaser. *Whaley Bridge Printing Co.* v. *Green* (2) falls within the class of cases in which the price demanded is not the real price. So in *Salford Corporation* v. *Lever* (3) a fair price was arrived at and commission added to it. In this case the price of the property was fixed before the plaintiff knew anything about the defendants in connection with the matter. The only possible ground of action at law in such a case is fraud, and no fraud has been shewn on the part of the plaintiff. It was not shewn that at any stage of the matter he knew that the agreement for commission was concealed by Govan from the defendants. Apart from fraud, an action for money had and received will not lie against the plaintiff in respect of the 500*l.* So far as any such right of the defendants is concerned, it could only be put upon the ground that they had a right of property in the commission due to their agent which

(1) 2 Manson's Bky. Cas. 470. (2) (1879) 5 Q. B. D. 109.
(3) [1891] 1 Q. B. 168.

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they could follow into the plaintiff's hands: that there was in effect money of theirs in their agent's hands, which the plaintiff has received from their agent, and of which he is therefore trustee for them. It is submitted that no such right of property exists in this case. The case of *Lister* v. *Stubbs* (1) shews that the relation between Govan and the defendants in respect of the commission is not that of trustee and cestui que trust, and that the right of the defendants as against Govan cannot be regarded as property of the defendants which can be followed. Assuming that they had an equitable property in the commission agreed to be paid to their agent, and he was therefore trustee for the defendants in respect of it, cestuis que trust whose property has been dealt with in breach of the trust have an election to claim the property or the proceeds of that dealing with it. They cannot claim both. They cannot take the benefit of a bargain which has been made for the sale of the trust property, and also claim the property itself. Here, either the commission was not payable until the whole of the purchase-money was paid, or at any rate it was doubtful on the terms of the agreement for commission whether that was not so, and thereupon the agreement was made to reduce it by 500*l.* in consideration of the immediate payment of the residue. If the agreement for commission was ambiguous in this respect, the plaintiff and Govan agreed on the footing that the commission was only payable in futuro. The defendants having taken the proceeds of that agreement cannot now repudiate it and claim the whole 2500*l.* The minutes of the defendants' meetings shew that with full knowledge of the whole transaction, and knowing that what Govan obtained under that agreement was in purchase of their chose in action, the defendants expressly accepted it in full satisfaction thereof. The plaintiff was then a creditor of the defendants for a large amount, and continued to forbear from suing them; and they accepted that forbearance without giving him notice that they claimed any more in respect of the commission. The defendants cannot now turn round and claim the 500*l.* They could not take the 2000*l.* received by

(1) (1890) 45 Ch. D. 1.

Govan otherwise than as what it was, namely, the purchase-money of the right to commission which he would have had in futuro. If they ratified what he had done quoad the 2000*l.*, they must be taken to have ratified the entire agreement on the footing that Govan had been acting for them throughout. Further, the onus is on the defendants to shew non-disclosure, and they have not done so: *Cavendish Bentinck* v. *Fenn.* (1)

Rufus Isaacs, Q.C., in reply. It is noticeable that the first agreement as to commission was with a view to float a company, and the venture was a joint one of the plaintiff and Govan. It was contemplated throughout that Govan was to act as agent for some principal, and so could not be in a position to take a commission. *Cavendish Bentinck* v. *Fenn* (1) was distinguished in *Archer's Case.* (2)

Cur. adv. vult.

Dec. 13. A. L. SMITH L.J. read the following judgment:— The question in this case is, as to what is the position of a vendor of property who pays a secret commission to a person whom he knows to be the agent of the vendee, and the facts are as follows:—

By an agreement dated January 8, 1897, the plaintiff sold a gold mine in British Columbia, of which he was then possessed, to the defendant syndicate, and he sues the syndicate upon a promissory note for 5000*l.* given to him by them in part payment of the purchase-money. As to the sum of 500*l.* the defendants counter-claim, and assert that upon the facts which they subsequently discovered they are entitled to recover this sum from the plaintiff, and it is agreed by the learned counsel on each side that this case is to be decided upon the admission that the plaintiff has received this sum of 500*l.* from the defendants.

I now revert to the facts antecedent to the agreement of January 8, 1897. In the month of August, 1896, the plaintiff, who, as before stated, was possessed of a gold mine in British Columbia, was desirous of selling it, and he there met a Mr. Govan. By an agreement in writing dated September 26,

(1) (1887) 12 App. Cas. 652. (2) [1892] 1 Ch. 322.

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1896, and made between the plaintiff and Govan, the plaintiff gave an option on his mineral claims to Govan for a period of six months, and in this agreement it was stated that the option was granted to Govan to enable him to deal with the properties with the object of forming one or more limited liability companies on the London market, and Govan agreed to use his best endeavours with regard to the successful flotation of such company or companies on terms to be thereafter discussed and settled between the plaintiff and him, the plaintiff agreeing to hand Govan, on any such successful flotation, 10 per cent. on all the sums received in cash or shares accruing to the plaintiff. It will be seen that by this agreement the plaintiff agreed to pay to Govan one-tenth of what purchase-money he might be able to obtain from the company which through Govan's instrumentality was to be brought into existence to become the purchasers of the plaintiff's mine, and I agree with my brother Bigham that, when a vendor sells property subject to the payment by him of a commission, the commission is added to the price asked by the vendor; in other words, the purchase-money by reason of the commission to be paid by the vendor is loaded with the amount of commission so to be paid. At the time when this agreement of September 26, 1896, was entered into the plaintiff did not know that Govan was agent and managing director, as in fact he was, of the defendant syndicate, though he did know that Govan was connected with the companies. The learned judge has found that at this time the plaintiff was acting with perfect honesty and good faith, but this by no means exhausts the case; for after the plaintiff came to this country, until which time the negotiations for sale were not completed, a new set of facts arose, which give rise to the defendants' counter-claim. In the month of December, 1896, the plaintiff came to England at the instance of Govan in relation to the sale of his gold mine. Upon his arrival he went to see Govan, who had a room in the office of the defendant syndicate in Ryder Street. The plaintiff was constantly there, and he admitted in cross-examination that before the contract of purchase and sale of his property was entered into between him and the defendants upon January 8, 1897, he knew that

Govan was a director of the defendant syndicate, and that he was, as such director, negotiating with him (the plaintiff) for the purchase of his property on behalf of the syndicate. The plaintiff made an effort in his evidence to get rid of this fatal admission, which was undoubtedly true, by suggesting he had sold the property to Govan before he knew of the above facts; but when pressed in cross-examination this suggestion was found to be without foundation, and in my judgment was clearly not the truth. The price fixed by the contract of January 8, 1897, was 140,000*l.*, of which 25,000*l.* was to be paid in cash at certain named times, and the balance by a transfer to the plaintiff or his nominees of 115,000 fully paid-up shares of 1*l.* each in a company about to be promoted by the syndicate. It appears to me plain that the meaning of what took place between the plaintiff and Govan was that one-tenth of the ten-tenths of the purchase-money was to go to Govan as commission, and Govan was to get up a company to buy the plaintiff's mine, and that the price which was to be paid to the plaintiff for the purchase of his mine was to embrace and cover Govan's cash commission of 2500*l.* At the time when the defendant syndicate contracted to purchase the plaintiff's mine—namely, on January 8, 1897—as a matter of fact the defendants had no knowledge of the arrangement made between their managing director, Govan, and the plaintiff as to the payment of this commission of 2500*l.* to the former, nor did they discover it until the next year—namely, in March, 1898—under the circumstances hereafter mentioned. Upon March 17, 1897, upon which date payment of 15,000*l.*, part of the purchase-money, had not become due, it was agreed between the plaintiff and Govan that, if Govan would get the defendant syndicate to pay to the plaintiff 5000*l.* in cash at once and 10,000*l.* in promissory notes, he would give Govan 2000*l.* in cash down instead of 2500*l.* payable to Govan under the agreement of September 26, 1896, and which had not then become payable, and for which Govan would then have had to wait. The plaintiff admitted that at the time he made the agreement of March 17, 1897, for Govan to get him 5000*l.* in cash at once and 10,000*l.* in promissory notes from the defendants, and for

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him to pay Govan 2000*l.* in cash, he (the plaintiff) knew that Govan was a director of the defendant syndicate and was acting for them. Govan succeeded in doing what was desired, and upon March 18, 1897, 2000*l.* in cash, and upon March 25, 1897, 3000*l.* in cash, making 5000*l.* in all, was paid to the plaintiff. The way in which the plaintiff then paid Govan his commission of 2000*l.* in cash down is very significant, and well worthy of attention, considering the arguments addressed to us by the plaintiff's counsel. The plaintiff under cross-examination admitted that, when the first payment was made to him, he wrote out a cheque for 1000*l.*, and went with this cheque to a bank, where the plaintiff had an account, accompanied by Govan, that Govan took with him a bag, and that the plaintiff asked the cashier to give him bank-notes in exchange for the cheque, which the cashier did, and that the plaintiff thereupon handed 1000*l.* in notes to Govan. Upon March 25, 1897, the plaintiff drew another cheque for 1000*l.* to complete the bargain between him and Govan, and the same thing was repeated as regards this cheque as with the former, and Govan was handed by the plaintiff this 1000*l.* also in notes. It was in this way that the plaintiff paid the 2000*l.* commission to Govan. It is also a fact of peculiar significance that, when the defendants had floated the new company, and 115,000 of its shares were allotted to the plaintiff in part payment of the purchase-money of his mine, 10 per cent. of those shares—i.e., 11,500—were placed in the name of a Mr. Allingham at the request of the plaintiff, and this allotment was accepted by Govan as payment to him of his commission, which was to consist of shares. The plaintiff, when challenged as to these transactions, was unable to give any intelligible reason either for the payment of the 2000*l.* in the notes to Govan and not by cheque, or for the allotment of the shares in the name of Allingham. It has been well said that secrecy is a badge of fraud, and these transactions in my opinion constitute good evidence that the plaintiff knew well that Govan was receiving this commission from him without the knowledge or assent of the defendants. What, then, is the case proved? It is that a vendor is paying a secret commission to a person whom he knows to be the agent of the

purchaser, in order to induce that agent to get the purchaser to pay the vendor a price for his property enhanced by the amount of the commission, of which fact the purchaser had no notice and the vendor knew that he had no notice. The evidence shews that the plaintiff subsequently quarrelled with Govan, and that the plaintiff through others gave information to the directors of the defendant syndicate of what had taken place as regards the agreements of September 26, 1896, and March 17, 1897, and the payment of commission to Govan. I do not understand that the plaintiff informed the directors of the way in which he had paid the commission to Govan. The directors of the syndicate then called upon Govan to explain what he had done, and to return the 2000*l.* which he had received from the plaintiff, and he thereupon paid to the syndicate the 2000*l.*; and they also insisted that the 500*l.* which formed part of the purchase-money and which the plaintiff had received should be returned to them by him, and they refused to meet the promissory note sued on so far as 500*l.* was concerned, and set up the counter-claim in this action alleging that the 10 per cent. commission was a secret profit or bribe by the plaintiff to Govan, their agent, and that they had unknowingly paid to the plaintiff the amount of the contracted commission (2500*l.*) in the purchase-money of the mine. Apart from the point upon which my brother Bigham decided against the defendants, it appears to me that the defendants are in the right in the position they took up, and indeed had it not been for this point, about which hereafter, the learned judge would have decided in the defendants' favour, for the whole tenor of his judgment shews that he would have done so.

In my judgment the contract of purchase of January 8, 1897, was a corrupt bargain, as was also the contract of March 17, 1897, and the evidence shews that, when each of those contracts was entered into, the plaintiff well knew that the defendant syndicate had no knowledge of the commission contracted to be paid to Govan by the plaintiff, nor that the purchase-money they agreed to pay to the plaintiff was enhanced by the amount of that commission. It was said by the plaintiff's counsel that the case in the House of Lords of

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Cavendish Bentinck v. *Fenn* (1) decided that where a person charges fraud, the onus is upon him to prove it, and to establish his charge in a case like the present he must establish that the person charged had not communicated the act complained of to the person injured, and unless he proves this the charge is not made out, for it is possible that he may have made the communication, in which case there would be no fraud; and further, the person making the charge must prove that he has, in fact, been injured by concealment. Assuming that in the present case this onus of proof is upon the defendants, though I am by no means certain that it is, I say that the defendants have satisfied this onus, and shewn out of the plaintiff's own mouth that he knew that Govan had not disclosed to the defendants the fact that he was receiving commission from the plaintiff, and that they have also proved that they have been injured by the amount by which the purchase-money had been increased to pay the contracted commission. For the same reason I need not discuss the case before my brother Romer of the *Lands Allotment Co.* v. *Broad.* (2) The case in this Court of the *Salford Corporation* v. *Lever* (3) is a clear authority that where an agent, who has been bribed so to do, induces his principal to enter into a contract with a person who had paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first. This is the head-note of this case, and it accurately describes what was decided thereon.

A great deal of argument was addressed to us whether an action for money had and received would lie at the suit of the defendants against the plaintiff in this case. Lord Esher in

(1) 12 App. Cas. 652. (2) 2 Manson's Bky. Cas. 470.
(3) [1891] 1 Q. B. 168.

the above case said it signified not what it may be called, whether damages or money had and received, and Lindley L.J. said: "It is obvious that in some form of action the corporation have a right to recover this shilling a ton from the coal merchants"—i.e., the 2500*l.* in this case. "Under the old practice I think they could have recovered it by an action for money had and received; probably they could have recovered it in more ways than one." It is not necessary upon the facts of this case to decide whether money had and received would lie, for I am of opinion that the 2500*l.* can be recovered from the plaintiff by action for damages for deceit, though I am by no means prepared to hold that an action for money had and received would not lie. Apart from what I am now coming to, and upon which Bigham J. decided adversely to the defendants, I am of opinion that the defendant syndicate have a good counter-claim against the plaintiff to recover the sum of 500*l.*

The point upon which Bigham J. decided against the defendants was that in April, 1898, they settled with Govan after they had notice of the agreements of September, 1896, and March 17, 1897, and that they therefore knew that Govan had agreed with the plaintiff for a reduced commission of 2000*l.*, and the learned judge held that the defendants thus elected to adopt the agreement of March and take from Govan the 2000*l.* which he had received under it from the plaintiff, for if there had been no such agreement Govan would not by then have received any commission at all. But how does this afford any answer by the plaintiff to the good cause of action which the defendants then had against him? The plaintiff was no party to this settlement with Govan, which was made solely between the defendants and Govan. The agreement with Govan which is recorded in a resolution of March 23, 1898, was only a wiping out and settlement by agreement of the claims of the defendants against Govan, not against the plaintiff. The resolution was as follows: "It is resolved that the repayment of the 2000*l.* offered by Mr. Govan be accepted with his assurance that he received the money in the full belief that he was justified in accepting it and without any dishonourable intention and thereby unwittingly made a mistake." With all

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submission to my brother Bigham, I cannot see how this settlement with Govan gets rid of or affords any answer to the cause of action which the defendants had against the plaintiff any more than the agreement which was set up in the *Salford Corporation* v. *Lever* (1) by way of defence was held to afford an answer by the defendant Lever.

For the reasons given above, I think judgment must be entered for the defendants upon the counter-claim.

COLLINS L.J. read the following judgment:—I am of the same opinion. It is not necessary to restate the facts.

The result of the transactions described is that from the outset the plaintiff dealt and intended to deal with Govan as a person who was to stand in a fiduciary relation to the purchaser, whom he was not only to find but to bring into existence. Even if the agreement of September 26 fell short of constituting the plaintiff himself a joint promoter of the company which was to be formed to buy his mining rights, it clearly debars him from contending that in agreeing to pay a commission to Govan he was dealing with a person who he did not suppose was about to be an agent for the intended purchaser. The basis of the arrangement was that he should be such an agent and should promote a company which should come into existence for the purpose of taking over the plaintiff's property on conditions prearranged between the plaintiff and Govan. Putting it at the lowest, therefore, he dealt with Govan from the outset as a person who was to stand in a fiduciary relation to the intended buyer, and who as such was debarred from receiving a commission from the vendor without disclosing the fact to such buyer. It is immaterial, therefore, that he did not know at that time that Govan was in fact a director of the defendant syndicate. As such he, Govan, was merely found to be actually in the same fiduciary relation to an existing purchaser that the plaintiff always intended he should be in to the purchaser whom he contemplated. The plaintiff, of course, admits that during the negotiation in which the price was settled between himself and Govan he became aware that the

(1) [1891] 1 Q. B. 168.

proposed purchaser was the defendant syndicate, of which Govan was the managing director. He was, therefore, consciously throughout dealing with and agreeing to pay a commission to the agent of a proposed purchaser. I only dwell on this point because Bigham J. has emphasized the fact that the plaintiff was perfectly honest in making the agreement of September 26, and did not then know that Govan was a director of the defendant syndicate. It is quite possible that the plaintiff may have honestly believed that there was no harm in a would-be vendor agreeing to give a commission to the agent of the purchaser, or that he did not know that a promoter stands in such a relation to a company which he promotes for the purpose of purchasing as to debar him from taking a secret commission from the vendor to such company; but his mental and moral attitude on this point could not alter the legal effect of his acts. It is, however, quite sufficient to raise the legal question in this case that he became aware before he agreed to sell to the defendants that Govan had been acting for them in bringing about the sale. The facts are, then, that the vendor and the buyers' agent, known to the vendor to be such, agree upon a price to be paid by the purchaser, one-tenth of which is to go into the pocket of the buyers' agent. To put it in plain language, it is a bribe, and the purchase-money is made large enough to include it. But it is said, it is a mere accident that Govan was a director of the defendant syndicate; the commission would have been the same had he sold to any one else. The answer is that an independent buyer was never contemplated, but only a buyer who, as a condition of his existence, should take over the property at a price large enough to admit of a margin of one-tenth going into the pocket of Govan. That Govan should be in such a relation to the purchaser as to have a potent voice in bringing about his assent to the price already prearranged was an essential factor in the original scheme. I think that, in this regard, the suggestion relied on by the plaintiff that the price was arranged generally by the plaintiff and Govan before the plaintiff knew of a particular purchaser in the shape of the defendant syndicate tells, not for him, but against him. If the

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whole price so foisted upon the syndicate by the agency of their bribed managing director had been paid by them to the plaintiff in ignorance of the facts, I think it would be open to them without rescinding the contract to demand back that part, so quantified, by which it was swelled for the purpose of bribing their agent. If the price overpaid can be quantified, and it was received in such circumstances as to make it contra æquum et bonum that the plaintiff should keep it, it can be recovered back. When it is impossible to quantify the amount overpaid there would, of course, be a difficulty in recovering the overplus as a liquidated sum; but I think that difficulty does not exist when, as here, the parties have themselves defined the part of the price which is to go back to the buyers' agent. The majority of the Divisional Court, and apparently the whole Court of Appeal in *Salford Corporation* v. *Lever* (1), said that there was no difficulty in holding that money had and received would lie for an overplus not more definitely ascertained. The question, therefore, is, was it contra æquum et bonum that Grant should retain such overplus? It was hardly contested that the overplus, if quantified, could be recovered back, if it could be shewn that the plaintiff was party to a fraudulent agreement with Govan to suppress the fact that the plaintiff was paying him a commission; but it was said that the defendants had not proved any such agreement, and that the learned judge had found that the plaintiff was honest in making the original contract of September 26, 1896; and though, for reasons I have given above and others which I will refer to a little later, I am not prepared to accept this view of the facts, I desire to try the rights of the parties on the hypothesis that the defendants have not proved affirmatively that the plaintiff knew that Govan, as the fact was, had not disclosed to the defendants the fact that he was to be paid a commission out of the price. In my opinion, if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction if impeached by the buyer, who has, in fact, had no notice, by proving that he believed that the agent

(1) 25 Q. B. D. 363; [1891] 1 Q. B. 168.

had disclosed the circumstances to his principal. I think it is clearly established that in such circumstances the buyer would be entitled to rescind the purchase: see *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.* (1), where it is pointed out, both by Malins V.-C. and by the Lords Justices, that bona fides without disclosure will not suffice to bar rescission; and I think it follows in principle that where the buyer elects not to rescind the sale, but can nevertheless point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected, he is entitled to recover it back. When the sum is thus liquidated, and in the hands of the vendor, I think it would be clearly contra æquum et bonum that he should retain it. I think that if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal, and as a result of it he is in possession of a sum which, whether the bargain stands or is rescinded, never ought to have been paid by the buyer, or found its way into the pocket of the seller. He is responsible as for money had and received to the use of the buyer, even though possibly he could not be made liable in an action of deceit. "According to my view of the law," says James L.J. (*Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.* (2)), "I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him." The *Lands Allotment Co.* v. *Broad* (3) is no doubt at first sight an authority to the contrary; but the case is rather obscurely reported

(1) (1875) L. R. 10 Ch. 515. (2) L. R. 10 Ch. 515, at p. 526.
(3) 2 Manson's Bky. Cas. 470.

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on the facts, and it seems possible that the learned judge may have inferred that the fact that their managing director was receiving a commission was known to the plaintiff company; but if it does decide that a vendor who pays a bonus to a person whom he knows to be the agent of a purchaser, with a view to influence the sale, and does not disclose the fact to the principal, can defend the transaction when impeached by averring that he thought the agent was so respectable a person that he would disclose it himself, I think it is contrary to principle, and indeed I think to the actual decision in *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.* (1), above cited. See also *Harrington* v. *Victoria Graving Dock Co.* (2) and *Smith* v. *Sorby*. (3) *Cavendish Bentinck* v. *Fenn* (4) is not an authority for the plaintiff. There the person on whom lay the burden of proving misfeasance failed to prove (as their Lordships thought) non-disclosure. Here the fact that no disclosure was made is clearly established. There is, however, not a shadow of ground for supposing that the plaintiff in this case thought that Govan had disclosed the fact of the commission, and he did not venture to suggest that such was the case himself. His bona fides or honesty in fact amounted to no more than this—that he saw no harm in what he did, which is precisely the excuse which was rejected in the *Panama Company Case* (1), as well as in many others reported and not reported. The *Lands Allotment Co.* v. *Broad* (5) is, however, an authority that a bribe of ascertained amount to the purchaser's agent included in the purchase-money can be recovered back from the vendor. However, I think that the circumstances attending the payment by the plaintiff of the two sums of 1000*l.* each to Govan, as well as the fact that he placed the shares coming to Govan in another name, are cogent evidence that he actively assisted Govan to conceal the fact that he was receiving a commission. I am of opinion, therefore, that, on the facts which I have so far dealt with, the plaintiff could be compelled to repay the 500*l.* claimed, and I do not think

(1) L. R. 10 Ch. 515.
(2) (1878) 3 Q. B. D. 549.
(3) (1875) 3 Q. B. D. 552, n.
(4) 12 App. Cas. 652.
(5) 2 Manson's Bky. Cas. 470.

Bigham J. was of a different opinion. I think he decided this case wholly by reference to the transaction between Grant and Govan whereby Grant agreed to give Govan 2000*l.* down instead of 2500*l.* at a later date. The learned judge thought that the defendant syndicate, having taken the 2000*l.* from Govan and having thus got the benefit of the agreement, must be taken to be bound by it as against Grant, and had, therefore, lost the right to claim the balance of 500*l.* With the greatest possible deference to the learned judge, I think he has misconceived the effect of what the defendants have done. As soon as any money found its way into their agent's hands as the result of a bargain for secret commission it became their money in his hands, and they were entitled to take it and keep it whether they elected to adopt or rescind the sale itself. It simply operated as a gift to them from Grant which did not in any way impair their rights against him unless, as in *Whaley Bridge Printing Co.* v. *Green* (1), they elected to sue upon the contract to pay it, treating it as made for them—in which case they might have to give credit for any payments made to the agent in pursuance of the contract which they had so elected to adopt; but they clearly would not be bound by any compromise which the agent had made without their authority, and Govan clearly would have had no authority to release or compromise the claim, which in this view was that of his principal, to the whole commission. No implication of ratification of the compromise can arise from their accepting money which is equally theirs, whether they adopt the compromise or not. But even if it were an adoption or ratification of the compromise between Grant and Govan so as to debar them from suing Grant on the contract itself, it in no way affected their right to claim the 500*l.* from Grant, not as due to them on the contract with their agent, but as money in excess of the true purchase-money received by him to their use, as was done in *Salford Corporation* v. *Lever.* (2) On the whole, then, I am of opinion that the plaintiff is not entitled to the sum of 500*l.* which he claims. That it is money which he could be compelled to refund if he received it, or which he could be made to

(1) 5 Q. B. D. 109. (2) [1891] 1 Q. B. 168.

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pay to the defendant syndicate if they chose to sue upon the agent's contract, or finally as damages in an action of deceit, and that to none of these actions would the fact that they have claimed and received the sum of 2000*l.* from Govan be an answer.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree. It seems to me that the effect of the agreement of September 26, 1896, was that Grant employed Govan as a promoter, agreeing to pay Govan a commission of 10 per cent. on all sums accruing to Grant in cash or shares of a company to be formed.

Grant also agreed to give Govan an option for six months—that is, an option to purchase to enable Govan to deal with the properties, mineral claims, with the object of placing one or more limited companies on the London market.

The consideration for this option was that Govan at his own expense was to send an engineer to inspect and report. I am not sure that it was an option to purchase; if not, I suppose it was an option to sell.

No price or limit of price was then fixed. Govan was then a director of and agent for the syndicate, the defendants in this action; but Grant did not then know this.

If one leaves out of consideration the relationship of principal and agent between Govan and the syndicate, it seems to me that it was merely a case of a commission paid by Grant to Govan for finding a purchaser of Grant's property. It may be that, as Grant and Govan were both promoters of the company to be formed, this would give the company some right to claim the commission if Govan had not disclosed to the company the fact that he was getting a commission; but we have not to decide this—the company is not before us.

The syndicate were also promoters of the company, but, as Grant did not know this, I do not see how the syndicate could have any claim against Grant for the secret commission taken by Govan when acting as the agent of the syndicate, except in respect of things done by him after he became aware of the fact of the agency.

In no case could the syndicate have any claim against Grant in respect of any wrong done to the company by the breach by any of the promoters of his fiduciary relation to the company.

Some time a little before January 8, 1897, Grant became aware that Govan was director and agent of the company, and at this time the price was fixed at 25,000*l.* in cash and 115,000*l.* in fully paid 1*l.* shares of the new company. Bigham J. says that it was after the fixing of the price that Grant became aware of Govan's relation to the syndicate; but I think that the evidence shews that it was at the very time of the fixing of the price.

On January 8, 1897, a contract was concluded between the plaintiff and the defendant syndicate by which the plaintiff sold his mine for the price above mentioned to the syndicate.

As I understand Bigham J.'s judgment, he is of opinion that, but for things which occurred afterwards, to which I will allude presently, Grant would have been accountable to the syndicate for the commission agreed to be paid to their servant Govan.

It is said that he would not be so accountable unless it was proved by the syndicate that Grant knew that Govan had not disclosed to the syndicate the fact of his taking commission and thus sharing in the price obtained by Grant from the syndicate, and had thus induced the syndicate to enter into a bargain to give a higher price than they would have done if they had known the truth.

The judgment of Romer J. in the *Lands Allotment Co.* v. *Broad* (1) perhaps affords some ground for the assertion, but I doubt if this is what his judgment means. No mention is made in his judgment of the time when Broad became aware of Balfour's relation to the purchasing company; but, assuming that the judgment does support the assertion, I do not agree with it. In my judgment, if Grant became aware before he paid the commission of the relation of Govan to the syndicate, he had no right to pay Govan unless he satisfied himself that the syndicate was aware that their agent in the purchase was taking a commission from him, the vendor, and, a fortiori, had

(1) 2 Manson's Bky. Cas. 470.

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no right to pay the commission in a case like the present, in which Grant not only knew of Govan's relations to the syndicate before he paid Govan the whole agreed commission, but knew of that relation at the very time when the contract of purchase was made.

It may be that in such a case the principal must make his claim before the transaction is completed by the payment of the price and the commission, and that the right of the principal to come upon the purchaser after such completion is limited to cases where fraud is proved, e.g., where the vendor at the time he agrees to give the commission knows that he is dealing with an agent of the purchaser, and in effect bribes the agent; but I doubt it, and it is not necessary to decide this in the present case, as neither the whole price nor the whole commission is paid, and the unpaid price is larger than the unpaid commission.

Now, as to the subsequent facts relied on by Bigham J. as discharging Grant from the obligation to account for the balance of the agreed commission. They are, as I understand, these: Grant, wishing to get part of the price a few days before it became due, got Govan to induce the syndicate to agree to pay 5000*l.* in cash before it became due, and to give promissory notes for the balance of the price at a date which I think was somewhat later than the due date.

Govan, however, stipulated with Grant that if he procured this settlement with the syndicate his (Govan's) cash commission should be paid by Grant at once, without waiting for the promissory note to mature and be paid.

Both Grant and Govan, it is said, regarded the cash commission as not payable until Grant had in fact received his 25,000*l.*; but this is not my view of the true reading of the commission agreement.

To this stipulation Grant agreed, but on the terms that the cash commission, which would otherwise be 2500*l.*, should be reduced to 2000*l.* Grant thus, in consideration of promising a present payment, got the cash commission reduced by 500*l.*

The proposed settlement was carried through by the syndicate, but there is no evidence that the syndicate had any knowledge

either of the original agreement for commission, or of the agreement for its reduction; on the contrary, the mode in which Grant paid Govan the reduced commission, and Grant's evidence as to this, and the placing of the shares in the name of a nominee of Govan, suggest that Grant and Govan both wished to keep the fact of the commission agreement and the payment of the 2000*l.* from the knowledge of the syndicate.

I cannot see how this agreement, made behind the backs of the syndicate, can affect their rights. Subsequently the syndicate discovered that Govan was taking commission, and claimed from Govan and obtained from him both the share commission and the 2000*l.* cash commission which he received, and accepted this in full settlement of their claim against Govan.

When the defendants thus settled with Govan they knew of both the original agreement for commission and of the agreement for the reduction of that commission, and Bigham J. sums this up by saying that the syndicate, knowing all the facts, elected to treat their rights as defined by the second agreement, and they thereby got the benefit of that agreement, the benefit consisting of an immediate settlement of the commission in the place of a deferred settlement, and that having taken that benefit they cannot say they are not bound by all the terms of the second agreement, and one of those terms was that the commission should be reduced by 500*l.* I cannot agree to this. I do not think that the syndicate took the 2000*l.* as undisclosed principals intervening and adopting what their agent had done, but as persons to whom Govan as their agent owed a fiduciary duty, and who had done them a wrong by taking a commission, and I think that Grant was a party to that wrong and guilty of a breach of a constructive fiduciary duty to the syndicate at the time when he paid the 2000*l.*, and I do not think that the compromise with their agent is a thing which Grant can insist upon having the benefit of.

There is nothing in the facts relating to the compromise between the syndicate and Govan to give Govan a right to complain of the present claim against the syndicate as a breach of the agreement of compromise made by the syndicate with

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him. Grant cannot complain he was not a party to that agreement of compromise or aware at the time of it.

In my judgment the syndicate can recover the 500*l.*, and, if it had not been paid, could have recovered the whole 2500*l.* by action or counter-claim. The form of such action would in my judgment be an action for damages, quantified, it is true, but still damages; but I do not decide that money had and received would not lie, though I doubt it.

Appeal allowed.

Solicitors for plaintiff: *Gush, Phillips, Walters & Williams.*
Solicitors for defendants: *Snell, Sons & Greenip.*

A. M.

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[IN THE COURT OF APPEAL.]

LORD STANLEY OF ALDERLEY *v.* WILD & SON.

Crown—Prerogative of—Action between Subjects involving Rights of the Crown—Transfer to Revenue Side—Information by Attorney-General—Stay of Proceedings.

In an action of trespass in a county court against tenants of the Crown, a question affecting the rights of the Crown over certain land was involved. Judgment was given in the county court for the plaintiff for damages and an injunction, against which the defendants appealed. The Attorney-General then filed an information against the plaintiff praying for a declaration of the rights of the Crown in the matter:—

Held, that the Crown was entitled to an order for the transfer of the county court appeal to the revenue side of the Queen's Bench Division and for a stay of proceedings therein until after the hearing of the information.

APPEAL from an order of a Divisional Court (Ridley and Darling JJ.) as after mentioned.

In 1840 the Crown granted by deed to Lord Stanley of Alderley and his heirs certain lands in Anglesey. The grant contained a reservation of all mines, minerals, and quarries within, upon, or under the lands granted by the deed with full power to Her Majesty, her heirs, successors, and assigns, and her and their servants or agents to enter upon, work, use, and

enjoy the same and every of them as fully and effectually to all intents and purposes as if the grant had not been made. It appeared that the Crown had granted a lease of quarries of china stone within and under lands included in the deed of 1840 to Messrs. Wild & Son, who had erected on the surface a building for storing dynamite for the purpose of working the quarries. Lord Stanley of Alderley brought an action in the county court against Messrs. Wild & Son, claiming damages for trespass by them in entering on the plaintiff's land for the purpose of erecting thereon a building for storing dynamite and other explosive substances and for waste, and an injunction. The action came on for trial in the county court, and on July 11, 1899, the county court judge gave judgment for the plaintiff, finding that the erection of the building for storing dynamite was not reasonably necessary for the purpose of working the quarries; and he thereupon awarded the plaintiff 1*l.* damages and granted an injunction to restrain the defendants from using or trespassing upon the land of the plaintiff for the purpose of and from erecting thereon a building for storing dynamite and other explosive substances and from committing waste upon the said land. The defendants gave notice of appeal to the High Court against the judgment. On August 12, 1899, the Attorney-General filed an information against Lord Stanley of Alderley asking that it might be declared that Her Majesty in right of her Crown, and her lessees, agents, and servants were entitled to enter upon, work, use, and enjoy the china stone, and all other mines, minerals, and quarries in, under, and upon the lands granted by the deed of 1840, and for that purpose to do and exercise all such acts, powers, and privileges upon or affecting the surface of the said lands as could have been done or exercised by Her Majesty's authority if the surface had not been granted, and that the rights of the Crown in the premises might be declared; and that it might be declared that the maintenance on the surface of the said lands and the use of a store for explosives for the purpose of working the quarries of china stone in the said lands was as against the defendant a lawful and proper exercise of the powers reserved to Her Majesty by the deed of 1840, and that

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the defendant might be restrained by injunction from doing or causing to be done any act, or from taking or continuing any legal proceeding, for the purpose of interfering with the said store for explosives or with any buildings maintained on the said lands or with acts done or to be done by any lessee or licensee of Her Majesty in the exercise of the surface powers and privileges reserved by the deed of 1840, and that all proceedings for the purpose of enforcing the order of the county court might be stayed.

An application was made to the Divisional Court on behalf of the Crown for an order that the appeal in the county court action should be transferred to the revenue side of the Queen's Bench Division of the High Court, and that all proceedings therein should be stayed until after the hearing of the information by the Attorney-General against Lord Stanley of Alderley. The Court granted the application. Lord Stanley of Alderley appealed.

Haldane, *Q.C.*, and *Bryn Roberts*, for Lord Stanley of Alderley. It may be admitted that the authorities shew that, where an action which involved the rights of the Crown was pending between subjects, the Crown had a right by virtue of its prerogative to have the action removed to the revenue side of the Exchequer, but this was subject to the condition that the plaintiff in the action should be placed in the Exchequer at the same stage of forwardness as that at which he had arrived in the action in the court from which the action was removed: see *Cawthorne* v. *Campbell*. (1) It is submitted that under the present system, the old Court of Exchequer being abolished, and its jurisdiction transferred to the High Court, no question as to this prerogative really arises. The county court appeal is already in the equivalent of the old Court of Exchequer. The really important question is as to the stay of proceedings. It may be admitted that the authorities shew that, where an action involving a question as to the rights of the Crown is pending between subjects, and the Crown chooses to bring a suit on its own account to establish

(1) (1790) 1 Anstr. 205, n.

its rights, it is entitled to a stay of proceedings in the action until after the hearing of the suit brought by itself. But it is submitted that the authorities do not shew that the Crown is so entitled after judgment in the action between subjects. The recent cases seem to shew that the Crown is only entitled to a stay of proceedings where the suit brought by the Crown will afford an equivalent means of determining the same question as that which is raised and still remains undetermined in the action to be stayed. Here the questions of fact raised by the county court action have been already determined in that action, and the county court appeal must be decided upon the facts as found by the county court judge. The Crown is really endeavouring to get the action in the county court retried upon the information, but it is submitted that there is no precedent entitling the Crown to do this.

[They also cited *Attorney-General* v. *Hallett*. (1)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Vaughan Hawkins*, for the Crown. The authorities clearly shew that the Crown is by virtue of its prerogative entitled to an order such as that made by the Divisional Court. It is well settled that in cases where the rights of the Crown are involved the Crown is entitled to be the actor, and, if the Crown itself institutes proceedings for the purpose of determining its rights, any other proceedings pending between subjects in which the question of the Crown's rights in the same matter is involved will be stayed: *Attorney-General* v. *Barker* (2); *Attorney-General* v. *Constable*. (3) All that is asked is that the decision of the question raised by the information shall not be prejudiced by the county court appeal coming on before the information. The case of *Yates* v. *Dryden* (4) is a distinct authority in favour of the Crown's right to such an order as this even after judgment in the action proceedings in which are to be stayed. The injunction in the county court action would have the effect of compelling the tenants of the Crown to pull down a building which is the property of the Crown as reversioner. If the county court appeal were heard and determined in favour of the

(1) (1846) 15 M. & W. 97.
(2) (1872) L. R. 7 Ex. 177.
(3) (1879) 4 Ex. D. 172.
(4) (1634) Cro. Car. 589.

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plaintiff before the information, the plaintiff would be entitled at once to enforce the injunction. The decision of the question of law as between the plaintiff and defendants on the appeal must prejudice the decision of the question of law as between the Crown and the plaintiff on the information. Apart from any question of the prerogative of the Crown, it is submitted that in the case of an ordinary landlord in the same position as the Crown occupies in this case the Court would make such an order as has been made.

[They also cited *Attorney-General* v. *St. Aubyn* (1); *Leonard* v. *Rogers*. (2)]

Bryn Roberts, in reply.

A. L. SMITH L.J. The first question is whether by virtue of its prerogative the Crown has a right to have a county court action such as this, in whatever stage it may be, removed to the revenue side of the Queen's Bench Division. It was not really contested that it has that right, and in my opinion it is clear that the order of the Divisional Court was right so far as the transfer of the appeal from the county court to the revenue side is concerned. The Divisional Court, however, proceeded further and ordered that proceedings in the county court appeal should be stayed until after the rights of the Crown had been determined by the result of the information filed by the Attorney-General. It was contended in regard to this part of the order that the application of the Crown was too late and that the prerogative right of the Crown in such a case did not extend to having an action stayed after judgment in it had been given. I can find no authority for any such limitation of the right of the Crown. The case of *Yates* v. *Dryden* (3) appears to me to be a direct authority to the contrary; because in that case, while a writ of error was pending, and therefore after judgment, the Attorney-General intervened, and the Court held that he was not too late, and that the proceedings on the writ of error must be stayed. That case is in my opinion a distinct authority in favour of the order of the

(1) (1811) Wigh. 167. (2) (1609) Wigh. 204.
(3) Cro. Car. 589.

Divisional Court staying the proceedings on the county court appeal. There are other more recent authorities to the same effect. In *Attorney-General* v. *Barker* (1) Kelly C.B. said: "Here the Crown is the plaintiff in the suit, and, on principle and authority, I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the establishment of any customs belonging to a manor, by means of a suit instituted by the Crown itself, and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant, and can only appear as defendant." This also is a clear authority that the Crown is entitled by virtue of its prerogative not only to have the proceedings in the county court action removed to the revenue side of the Queen's Bench Division, but also to have them stayed in order that the Crown may become the actor in litigation affecting its rights by instituting a suit itself. With regard to the question whether, apart from any prerogative of the Crown, the Court would in its discretion stay the proceedings on the county court appeal, I say nothing, for I think that the prerogative of the Crown covers the whole case. On these grounds I think the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. I think that, where there is an action by one subject against another upon a matter in which the Crown is interested, the Crown has two rights which are not necessarily connected with one another. One of those rights is to have the action removed to the revenue side of the Queen's Bench Division. This removal does not of itself put an end to the action. When an action is so removed, it appears from the authorities that the proceedings in it may be moulded or modified in any way which may be necessary for the conduct of the trial of it when removed. Provision has been made by the Court in several cases, as mentioned in *Cawthorne* v. *Campbell* (2), in order that the action might when removed be placed in the same stage of forwardness as it had arrived at in the court from which it was removed, which shews that the action is not put an end to by the removal.

(1) L. R. 7 Ex. 177.
(2) 1 Anstr. 205, n.

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Vaughan Williams L.J.

The case of *Attorney-General* v. *Hallett* (1) further appears to shew that, if the action were originally in such a form that the Crown could not intervene in it without doing something or permitting something which it was impossible for it to do or permit, the Court could mould the action so as to meet the difficulty, and that the action might then proceed. Therefore, in the present case, if the Crown had been content merely to obtain an order for the transfer of the proceedings in the county court action, I think the proceedings in that action might if necessary have been moulded by the Court, and the appeal might have proceeded and the matter have been disposed of in that way. But the Crown has preferred to exercise another right. It has applied that, when the county court action is transferred to the High Court, the proceedings in it shall be stayed until the information which raises the same question as to the rights of the Crown has been tried. The case of *Yates* v. *Dryden* (2) appears to shew that the Crown could have obtained such a stay of proceedings without applying for the removal of the county court action, and therefore that the removal of the action was not essential to the stay of proceedings therein. But the case of *Leonard* v. *Rogers* (3), cited in *Attorney-General* v. *St. Aubyn* (4), seems to shew that there is no objection to the Crown adopting both courses—namely, applying for the removal of the action and also for a stay of proceedings at the same time. It seems to me that the cases afford ample authority for the making of the order which was made by the Divisional Court. I do not, speaking for myself, wish to express any opinion on the question whether the order for the stay of proceedings is one to which the Crown is entitled as of right jure coronæ, so as to exclude any discretion of the Court in the matter. It seems clear that, as regards the order for the removal of the action, the Crown is entitled to that order jure coronæ. I have thought it right, in dealing with a rather unfamiliar subject, to go somewhat closely into the matter with a view to understanding the practice in such cases; and I wish to make one further observation with regard to

(1) 15 M. & W. 97.
(2) Cro. Car. 589.
(3) Wigh. 204.
(4) Wigh. 167.

what I understand to be its effect. I have pointed out that, after the removal of the original action, when put into the proper shape, it might ultimately be proceeded with and tried if necessary. When the information filed by the Crown in this case has been tried, it may or may not be found to be the case that the whole matter which was involved in the county court action is covered by it. If that action merely involved the question of the right of the Crown or the tenant of the Crown to erect the buildings in question by reason of the reservation in the grant to Lord Stanley of Alderley, the whole matter will be disposed of by the information; but, if the action in the county court involved a question whether the tenants of the Crown were guilty of committing a nuisance, not merely by erecting a building, but by using it for the purpose of storing such a quantity of dynamite as to constitute a danger to the Queen's subjects in general and to Lord Stanley of Alderley in particular, I do not know that that question would be disposed of by the trial of the information, and, if not, I am far from saying that it might not, after the trial of the information, be competent for Lord Stanley of Alderley to go on with the proceedings in the county court action, including the appeal, and to get judgment upon the hearing of that appeal for so much of his rights as might not be inconsistent with the rights of the Crown as established upon the trial of the information.

Appeal dismissed.

Solicitor for the Crown: *Solicitor to Office of Works.*

Solicitor for Lord Stanley of Alderley: *T. D. Jones, for T. R. Evans, Holyhead.*

E. L.

Considered. GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 Ch. 322

1899
Nov. 27.

In re FORD.
Ex parte OFFICIAL RECEIVER.

Bankruptcy—Assets—Execution—Part Payment of Judgment Debt — Subsequent Receiving Order—Benefit of Execution — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-s.* 1.

By s. 45, sub-s. 1, of the Bankruptcy Act, 1883, an execution creditor is not entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order; by sub-s. 2 an execution against goods is completed by seizure and sale.

Execution having been issued upon a judgment for 80*l.* and costs, the sheriff on December 31, 1898, levied under a writ of fi. fa. On January 5, 1899, the debtor, under an arrangement with the solicitors of the execution creditors, paid the solicitors a sum of 40*l.* on account, and gave to the sheriff authority to re-enter under the writ of fi. fa. upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew. On January 14 a receiving order was made against the debtor on his own petition; at that date the sheriff had not re-entered under the writ of fi. fa. :—

Held, that the execution had not been completed as to the 40*l.* at the date of the receiving order, that the execution creditors were therefore not entitled to retain the benefit of the execution, and that the trustee in bankruptcy was entitled to the 40*l.* as part of the debtor's estate.

APPEAL from a decision of the judge of the Birmingham County Court, dismissing an application of the official receiver. The facts were shortly as follows :—

In December, 1898, Messrs. Crawley, Parsons & Co., the respondents to this appeal, recovered judgment against the debtor for 80*l.* and costs, and on December 31 the sheriff seized the debtor's goods and chattels under a writ of fi. fa. Negotiations took place between the parties, and on January 5, 1899, the debtor paid to the respondents' solicitors 40*l.* on account of the judgment debt, and gave authority to the sheriff to re-enter under the writ of fi. fa. upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew, acting upon instructions from the respondents' solicitors. On January 14 a receiving order was made against the debtor on

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his own petition, which was in due course followed by an adjudication, the official receiver being appointed trustee in the bankruptcy. At the date of the receiving order the sheriff had not re-entered under the writ of fi. fa. The official receiver applied to the county court judge for an order directing the respondents to pay over to him the 40*l.* as being part of the debtor's estate available for the general body of creditors, but the judge refused to make the order. The official receiver appealed.

Muir Mackenzie, for the appellant. The 40*l.* paid to the execution creditors' solicitors was part of the benefit of the execution, and the execution creditors are not entitled to retain the benefit against the trustee. There was an actual levy under the writ to the extent of 40*l.*: *Chapman* v. *Bowlby* (1); and that sum was part of the execution upon which the sheriff would be entitled to his poundage: *Alchin* v. *Wells* (2), recognised by the Court of Appeal in *Mortimore* v. *Cragg*. (3) The execution was incomplete, for there was a withdrawal by the sheriff after levy, with authority to him to re-enter in a certain event. If this money had been paid direct to the sheriff, there could have been no question of the trustee's right to it under s. 11, sub-s. 2, of the Act of 1890; that sub-section does not apply to the present case, but s. 11, sub-s. 1, does apply, at least in so far as it shews that the only mode of completing an execution except by sale is by the receipt or recovery of the full amount of the levy. Here there was a receipt of part only of the levy, the execution was incomplete, and the execution creditors are under s. 45 of the Act of 1883 deprived of the benefit of the incomplete execution, and the trustee is entitled to the 40*l.* on behalf of the general body of creditors. (4)

(1) (1841) 8 M. & W. 249.

(2) (1793) 5 T. R. 470; 2 R. R. 641.

(3) (1878) 3 C. P. D. 216.

(4) By 46 & 47 Vict. c. 52 (the Bankruptcy Act, 1883), s. 45, sub-s. 1, "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the

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Edward Cave, for the respondents. The execution creditors are entitled to retain the 40*l.*, for as to that sum the execution was completed when the sheriff withdrew. There was then only a conditional right in the sheriff to re-enter—a right which under the circumstances of the case never became absolute. The completion of the execution must, therefore, be taken to relate back to the time at which the sheriff went out of possession. If the whole 80*l.* had been paid before the sheriff withdrew, the execution creditors could have retained the money; and it cannot have been intended that an execution creditor who is lenient to his debtor is to be in a worse position than one who insists on getting his full debt. Had the sheriff re-entered, he could only have levied for the balance of 40*l.*, and not for the original 80*l.*, which shews the execution to have been complete pro tanto. [He cited *Figg* v. *Moore Brothers*. (1)]

Muir Mackenzie, in reply. The 40*l.* was not paid to free a particular lot of goods, and the sheriff was entitled to re-enter on the whole; had particular goods been released it might have been possible to contend that the execution was complete pro tanto. The forbearance of the creditor is not in point. [He referred to *In re Follows, Ex parte Follows*. (2)]

WRIGHT J. I am of opinion that this appeal should be allowed. Only two sections have been suggested as having any application to the case—s. 45, sub-s. 1, of the Bankruptcy Act,

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presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

By sub-s. 2, "For the purposes of this Act, an execution against goods is completed by seizure and sale. . . . ."

By 53 & 54 Vict. c. 71 (the Bankruptcy Act, 1890), s. 11, sub-s. 1, "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

(1) [1894] 2 Q. B. 690.

(2) [1895] 2 Q. B. 521.

1883, and s. 11, sub-s. 1, of the Bankruptcy Act, 1890. It is admitted that sub-s. 2 of the latter section does not apply, and in my judgment sub-s. 1 does not apply either, for in the present case the money in question did not come to the hands of the sheriff. The question, therefore, depends entirely upon s. 45, sub-s. 1, of the Act of 1883, and we have to ask ourselves whether that sub-section applies to the facts of the present case: in my opinion it does. It seems to me that the provision that the creditor "shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order," hits the present case exactly. Then sub-s. 2 goes on to provide that for the purposes of the Act an execution against goods is completed by seizure and sale; but in the present case there has been no sale, and the execution has not been completed as to any parcel of the goods seized. There was no release of any specific portion of the debtor's goods; had there been, there might have been some substance in an argument that as to those particular goods the execution had been completed; the sheriff, however, under the arrangement was entitled to re-enter upon the whole of the goods. Under the circumstances, I am unable to see how the execution can be held to have been completed when the Act requires both seizure and sale to exist before completion. I am not aware of any other mode of completion of an execution; if there be one, it certainly was not accomplished in the present case. Doubtless it seems hard on a creditor that he should be forced to give up money which he has actually received, but we have only to construe the section, and it is easy to see that there may be sound reasons for the adoption of a rule which in individual cases may be productive of hardship; the Legislature may well have considered it undesirable to allow a creditor to retain a hold over the assets of his debtor in order to secure the payment of future instalments of his debt. This appeal must, therefore, be allowed.

CHANNELL J. I am of the same opinion. I think we may leave s. 11 of the Act of 1890 out of consideration, as we might

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have done with s. 46 of the Act of 1883, if it had not been repealed, and the provisions of s. 11 of the later Act substituted for it; s. 11 does not cut down the rights of the execution creditor as against the general body of creditors; that is, I think, done by s. 45 of the Act of 1883, while s. 46 of that Act and the substituted section in the Act of 1890 supply the machinery for getting the money out of the hands of the sheriff, and deal with the duties of the sheriff under the circumstances there contemplated. But it seems to me that s. 45 of the Act of 1883 does cut down the rights of the individual execution creditor. The question which always arises in cases of this nature is whether the particular creditor is entitled to his money in full, while the general body of creditors get only their dividend out of the estate, and the test seems to be whether the individual has completed his execution against the debtor's goods. If there has been only a partial execution, a levy and no subsequent completion, the intention of the Act apparently is that the other creditors may step in and insist on having the whole of the debtor's estate rateably divided. The test seems to be whether or no the execution has been partial only—that is, whether or no a partial benefit has been obtained from it; if the execution is in that sense incomplete, the general body of creditors are entitled to have the property distributed rateably. This is what the section says when it provides that, unless before the date of a receiving order the execution is completed (which is defined as meaning completed by seizure and sale), the execution creditor is not to retain the benefit of his execution. It seems that if the execution creditor gets a partial benefit (here he got 40*l.* on account), but retains anything in the nature of an incomplete execution, then he cannot retain the partial benefit which he has already received. If the respondents in the present case had accepted the 40*l.* in full satisfaction of the debt and had not claimed a right to re-enter at some subsequent time and go on with the execution, then I think they might have retained the 40*l.*; it would have been the same as though instead of 40*l.* they had received the whole 80*l.* through the sheriff, which they clearly might have kept. But they claimed

to have the benefit of an execution which was kept standing over, and which was incomplete, and the section means that where the execution creditor is taking such a benefit the general creditors may come in if they can avail themselves of any act of bankruptcy, and may have the property distributed rateably and prevent the execution creditor from getting any benefit from an execution which is only partial and incomplete.

WRIGHT J. I wish to add that in my opinion s. 11, sub-s. 1, of the Act of 1890 would apply in the present case if the 40*l.* had been paid to the sheriff under the execution and not to the party, that is, to the execution creditors, for the section provides that "any money seized or received in part satisfaction of the execution" is to be delivered by the sheriff to the official receiver. It would be a strange state of things if the trustee were entitled to claim money from the sheriff and not from the party, who receives it, so to speak, in substitution for the sheriff.

Appeal allowed. Leave to appeal.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitors for respondents: *Milward & Co., Birmingham.*

W. J. B.

C. A.
1899
Dec. 1.

[IN THE COURT OF APPEAL.]

BAVINS, JUNR. & SIMS *v.* LONDON AND SOUTH WESTERN BANK, LIMITED.

Trover—Conversion of Document—Damages—Measure of—Non-negotiable Instrument—Money had and received.

The plaintiffs received from a company, which was indebted to them, an order addressed to the company's bankers for the payment of the amount of their debt. The order was not a cheque within the meaning of the Bills of Exchange Act, 1882, because the payment was made conditional upon signature of a receipt appended to the order. The order was stolen from the plaintiffs, the receipt being then unsigned. It was subsequently handed to the defendants, a banking company, with a forged indorsement and receipt thereon, for collection on behalf of a customer of theirs whom they credited with the amount of it. It did not appear that the customer knew that the order had been stolen. The order was presented by the defendants to the bank to which it was addressed, and the amount specified therein was thereupon paid by that bank to them. Subsequently, the plaintiffs gave notice to the defendants that the order was stolen from them, and claimed the amount received by the defendants upon it. Nothing had in the meantime taken place to debar the defendants from cancelling the credit given to their customer as before mentioned:—

Held, that the plaintiffs were entitled to recover the amount received by the defendants upon the order as money received for the plaintiffs' use.

Query, whether they were entitled to recover that amount as damages for the conversion of the document.

APPEAL by the defendants from the judgment of Kennedy J. in an action tried before him without a jury.

The action was brought to recover a sum of 69*l.* 7*s.*, as damages for the conversion of a certain order in writing, the property of the plaintiffs, or, in the alternative, as money received for the plaintiffs' use.

The Great Northern Railway Company gave to the plaintiffs in respect of money owing to them for work done for the company a document which was as follows: "The Great Northern Railway Company. No. 1 Accountant's drawing account. London, July 7, 1898. The Union Bank of London, Limited. No. 2, Prince's Street, Mansion House, E.C. Pay to J. Bavins Junr. and Sims the sum of Sixty-nine Pounds 7/. Provided

the receipt form at foot hereof is duly signed, stamped, and dated. £69—7." Then followed the signatures of the secretary and assistant accountant of the Great Northern Railway Company. The order was crossed generally. The receipt form at the foot was as follows: "Received from the Great Northern Railway Company the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque. Signature ———. Dated ——— 189—." This document was stolen from the plaintiffs, the receipt being then unsigned. On July 15, 1898, the husband of a customer of the defendants, who had often before paid in cheques to his wife's account, came to the defendants' Shoreditch branch accompanied by a man who was unidentified. He handed the before-mentioned order to a clerk of the defendants there to be placed to the account of his wife. It then bore an indorsement which had not been made by or by the authority of the plaintiffs. This indorsement was not very legible, but the Court of Appeal upon production of the document were of opinion that the indorsement purported to be that of J. Bavins, Trench, and Sims, and certainly not that of J. Bavins, Junr. & Sims. The clerk called attention to the fact that the receipt form at the foot of the document was not filled in or signed. A few moments afterwards the document was again handed to the clerk with the receipt form filled in and signed with a signature corresponding with the indorsement. There was no direct evidence by whom the receipt was so signed, but it was not done with the authority of the plaintiffs. The clerk then received the order, and the defendants subsequently credited the customer with the amount specified in it. The order was the next day presented by the defendants to the Union Bank and paid by them. It did not appear that the defendants' customer or her husband knew that the order had been stolen. On August 13 the defendants received a letter from the plaintiffs' solicitor stating that the document had been stolen from the plaintiffs, and claiming the money which had been paid to the defendants upon it. It appeared that between July 15 and August 13 the customer's account had been operated upon by drawings out and payments in to amounts exceeding 69*l.* 7*s.*;

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but there had been no settlement of account between the defendants and the customer to prevent the defendants debiting the customer with the amount credited to her as aforesaid. Kennedy J. gave judgment for the plaintiffs for the amount claimed. (1)

Herbert Jacobs, for the defendants. If the document in question was not negotiable, the plaintiffs can only recover nominal damages in respect of a conversion of it by the defendants; and the action for money had and received will not lie, because there is no privity between the plaintiffs and defendants: *Rogers* v. *Kelly*. (2) Here the plaintiffs have not lost the amount for which the order was given, because they still have an action for their debt against the Great Northern Railway Company. All that has happened is that the Union Bank under a mistake of fact—that is to say, by reason of a forgery—have paid their money to the defendants. The Union Bank cannot debit the Great Northern Railway Company with the

(1) At the trial before Kennedy J. the defendants set up the defence that they were protected by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82, which provides that, where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. Kennedy J. held that the document in question was not a cheque within the meaning of the Bills of Exchange Act, 1882, because, the amount therein mentioned being only payable on condition that the receipt was signed, it was not an unconditional order in writing for payment of money within s. 3, and therefore not a cheque within s. 73 of the Act. Before the Court of Appeal, s. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55), which had escaped notice in the Court below, was relied upon as extending the provisions of s. 82 of the Bills of Exchange Act, 1882, to such documents as that in question. The Court of Appeal was however of opinion that there had clearly been negligence on the part of the defendants in receiving the document with the indorsement and the receipt signed in a name other than that of the payees, and therefore, even assuming the document to be within s. 82 of the Bills of Exchange Act, 1882, or s. 17 of the Revenue Act, 1883, the defendants were not protected by s. 82 of the Bills of Exchange Act, 1882. As the Court held that there was in fact negligence, the argument and so much of the judgment as related to the effect of the above-mentioned sections is omitted.

(2) (1809) 2 Camp. 122.

amount of the payment, and money of the Great Northern Railway Company to that amount must be considered as still in the hands of the Union Bank. The money paid to the defendants cannot therefore be considered the plaintiffs' money. The cases which may be relied upon by the plaintiffs, as shewing that the amount for which the document converted was given can be recovered as damages for the conversion, depend on the fact that in those cases the instrument converted was a negotiable instrument, or an instrument by virtue of which the money became payable. Here the document, being merely an authority to pay money, is, like an I O U, only evidence of a debt, and not an instrument which in itself makes the amount mentioned in it recoverable. In the case of a negotiable instrument the face value of it may be recoverable as damages for its conversion; but that depends upon the negotiability of the instrument, and is because, when such an instrument is converted, the true owner may be properly considered to have lost the face value of the instrument; for, while it is outstanding, he cannot sue upon the original consideration; whereas here, as already pointed out, the plaintiffs can still recover the amount for which the order was given from the Great Northern Railway Company. [He cited on this point *Clegg* v. *Baretta* (1); *Arnold* v. *Cheque Bank*. (2)] It is submitted that the plaintiffs cannot by suing for money had and received recover larger damages than they could in trover. The doctrine of waiving the tort and suing for money had and received originated in relation to technical considerations with regard to the forms of actions, and does not enable the plaintiff by waiving the tort to alter the measure of damages. In the *Fine Art Society, Limited* v. *Union Bank of London* (3), no point was taken as to measure of damages. Moreover, that was the case of a post-office order, which differs materially from the order in this case. The result of the conversion of the post-office order in that case was that the plaintiffs lost the amount of money which it represented.

(1) (1887) 56 L. T. 775. (2) (1876) 1 C. P. D. 578.
(3) (1886) 17 Q. B. D. 705.

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Furthermore, an action for money had and received will not lie, because the defendants, before knowledge that the money was the plaintiffs', did what is equivalent to handing it over to their principal—that is to say, they credited their customer with the amount, and she has drawn out of the bank amounts which, appropriating items according to the rule in *Clayton's Case* (1), have exhausted the amount in question. If the tort is to be treated as waived, the defendants must be looked upon as innocent agents who have received the money merely as agents and have, without notice of anything wrong, handed it over to their principal. Under those circumstances the defendants cannot recover the amount from their customer, and therefore the plaintiffs cannot recover it from them: see *Holland* v. *Russell*. (2) [He also cited *Buller* v. *Harrison* (3); *Cox* v. *Prentice* (4); *Skyring* v. *Greenwood* (5); *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris*. (6)]

J. F. P. Rawlinson, Q.C., and *Denis O'Conor*, for the plaintiffs. The plaintiffs are entitled to recover on the count for conversion the amount received by the defendants from the Union Bank as being the proceeds of the conversion. If not recoverable as damages for conversion of the document, the same amount is clearly recoverable as money had and received. By a wrongful conversion of the plaintiffs' document the defendants received certain money, and the plaintiffs are entitled, waiving the tort, to ratify the defendants' act, and treat them as having acted as the plaintiffs' agents in the receipt of the money.

The doctrine of *Holland* v. *Russell* (2) depends on the fact that an innocent agent has without notice changed his position by handing over the money to his principal. Assuming that the doctrine applies to tortfeasors like the defendants at all, the defendants here did not before notice change their position for the worse. Nothing had happened before August 13 to

(1) (1816) 1 Mer. 572; 15 R. R. 161.
(2) (1863) 4 B. & S. 14.
(3) (1777) 2 Cowp. 565.
(4) (1815) 3 M. & S. 344; 16 R. R. 288.
(5) (1825) 4 B. & C. 281; 28 R. R. 264.
(6) [1894] 2 Q. B. 157.

prevent them from debiting their customer with the amount with which they had credited her. Such a credit is only conditional according to the practice of bankers.

Herbert Jacobs, for the defendants, in reply.

A. L. SMITH L.J. The question is what amount is recoverable in this action either as damages for conversion of the document or as money had and received. In my opinion Kennedy J. was quite right in holding that this order was not a cheque within the definition given by the Bills of Exchange Act, 1882, s. 73, because it was not an unconditional order in writing for the payment of money within s. 3, sub-s. 1, of that Act. It does not seem to me very material whether the action is considered as one of trover or one for money had and received. Treating it as one of trover, the case stands thus. The defendants have undoubtedly converted to their own use a document belonging to the plaintiffs, and by means of that conversion and the receipt signed, which was merely a receipt for the amount mentioned in the document, they have been enabled to get from the Union Bank the 69*l.* 7*s.*, which would otherwise have been paid to the plaintiffs upon the document. I do not myself see why in these circumstances the plaintiffs are not entitled to recover from the defendants, as damages for the conversion of the document, the amount so received by the defendants. I am not sure however that the other members of the Court are prepared to agree in that view. But we all agree that, if that is not so, the count for money had and received can be sustained, and the amount received by the defendants can be recovered by the plaintiffs under it. If at the moment when the defendants received the money from the Union Bank, it could not be said to have been received for the plaintiffs' use, still they had in August notice that the plaintiffs claimed to be entitled to it, and they retained it after that notice. I think that, at any rate after notice to the defendants that it belonged to the plaintiffs, it became money received by the defendants for the plaintiffs' use. It was argued that the defendants, being merely agents for their customer, and having in effect paid the money over to her

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before they had notice of the plaintiffs' claim, an action for money had and received will not lie against them. But all they really did was to credit the customer with the money, and I see no reason why they could not have debited the customer with the amount upon its being shewn that she had no title to the document, and that it belonged to the plaintiffs. I think the judgment of Kennedy J. must be affirmed.

COLLINS L.J. I am of the same opinion. The question raised is as to the amount of damages recoverable in the action. There clearly having been a conversion of this document, it is said that, although, if the document had been a cheque in the proper sense of the term, the damages for that conversion would have been its face value, that measure of damages has no application to a document like this, which is not strictly a cheque. It is not really necessary to decide whether that is so, because the same amount of damages may be reached I think in another way, namely, as money recoverable in an action for money had and received. I do not however wish to be supposed to express an opinion that the face value of a document like this could not be recovered as damages for its conversion. It only differs from a cheque in that it imports a condition precedent to the payment of the money. Subject to that, it evidences, as it appears to me, a similar contract to that evidenced by a cheque. I do not quite see, as at present advised, that the fact that a condition is introduced would, if the condition were performed, make any substantial difference for this purpose between a document like this and a cheque. It may be that the case of *Clegg* v. *Baretta* (1) puts a difficulty in the way of taking this view. I have not had an opportunity of scrutinizing that case sufficiently for the purpose of determining how far the deposit-note there in question stood on the same footing as the document involved in the present case. As I have said, however, it does not appear to me necessary to decide this point, because I am clearly of opinion that the defendants are liable for the amount for which judgment has been given against them upon the count for money

(1) 56 L. T. 775.

had and received. They have wrongfully so dealt with a document belonging to the plaintiffs that they have received its full face value; and I think that the result is that the money so received by them by reason of that wrongful user of the plaintiff's document can be treated as money received by them to the use of the true owners of the document. That being so, what is the answer which the defendants set up to the claim of the plaintiffs for the money belonging to them which the defendants have in their hands? The only answer which they set up appears to be the fact that they have credited their customer with the amount of it. Apart from any other argument, the answer which the plaintiffs' counsel made to this appears to me conclusive, namely, that a credit so given to a customer by a bank is in its nature provisional only, and depends upon the question whether the cheque or other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of that afterwards turning out not to be so. There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her. Consequently there does not seem to me to be anything which prevents the plaintiffs from recovering that amount from the defendants.

VAUGHAN WILLIAMS L.J. I agree. It is clear that the defendants were guilty of a conversion of the document in question which was not a negotiable instrument within the Bills of Exchange Act, 1882. The question is as to the amount which the plaintiffs are entitled to recover in this action, either for that conversion or as money had and received. It was argued that, if the action is treated as one of trover, only nominal damages can be recovered, because the document converted in itself constituted no cause of action, but was merely evidence of a debt in respect of which it was given. But, even assuming that to be the nature of the document, it may be that the receipt of money upon it makes a difference. Treating the action as one of trover, the money paid by the

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Vaughan Williams L.J.

Union Bank does not seem to me to have been a gratuity, so as to bring the case within the doctrine of *Wills* v. *Wells*. (1) It was money paid and received as a payment in pursuance of the authority contained in the order, and I doubt whether it lies in the mouths of those who have received it, and who have given up the plaintiffs' document in exchange for that payment, to say that the money so paid is not as against them conclusive of the value of the document which they have converted. But in any case it seems to me to be clear that the plaintiffs are entitled to recover the amount received by the defendants upon the document as money had and received. Having received money by presenting the document which belonged to the plaintiffs, they cannot, in my opinion, if the plaintiffs choose to waive the tort, say that they did not receive the money on account of the plaintiffs; or at any rate they cannot say so after they have knowledge of the plaintiffs' title, unless before obtaining that knowledge they have altered their position for the worse so as to bring themselves within the doctrine of *Holland* v. *Russell* (2), the case which establishes that, if money is paid to an agent for his principal by mistake and he hands it over to his principal bonâ fide and without notice, he is protected from any action for money had and received by the person who paid it to him. In this case the defendants had full knowledge of the plaintiffs' title in August, and at that time there had been no change for the worse in the defendants' position with respect to their customer. Although the customer had been credited with the amount received by them, it was merely a provisional credit, and there had been no such settlement of accounts between them as disentitled the defendants as against their customer to strike out the credit. On the grounds which I have mentioned I think that this appeal must be dismissed. I should like in conclusion, in reference to the view suggested by my brother Collins as to the damages for conversion, just to refer to a passage I find in Sedgwick on Damages, 6th ed. p. 611, which seems to be somewhat in favour of that view. The learned author says, referring to American decisions: "In Pennsylvania it is held that trover

(1) (1818) 8 Taunt. 264.

(2) 4 B. & S. 14.

cannot be maintained for a chose in action as a share of stock, but may for the paper or evidence of debt; and that in such case the measure of damages is the debt of which the paper is evidence."

Appeal dismissed.

Solicitors for plaintiffs: *White & De Buriatte.*
Solicitors for defendants: *Hubbard, Son & Eve.*

E. L.

BARNACLE *v.* CLARK.

1899
Nov. 1.

School Board—Disqualification of Member—"Concerned in Work done under authority of Board"—Sale of Materials to Contractor with Board—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 34.

By s. 34 of the Elementary Education Act, 1870, a member of a school board who (inter alia) "shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board" is liable to a penalty, and his office becomes vacant.

The respondent, a member of a school board, sold sand and gravel to a builder who had entered into a contract with the board for the building of a school; at the time of the sale the respondent was aware that the sand and gravel were intended to be used (as they were in fact used) in the building of the school:—

Held, that the respondent had been concerned in work done under the authority of the board, and had therefore been guilty of an offence under the section.

CASE stated by justices for the county of Northampton.

An information had been laid against the respondent charging that he, between January 28 and February 11, 1899, then being a member of the Stanwick School Board, did share or was concerned in the profits of a certain bargain or contract with, or certain work done under the authority of, the said school board or managers appointed by them (to wit) did supply sand and gravel to one Alfred Traynar, a builder, he being then a contractor with the said school board for the building of schools at Stanwick, contrary to s. 34 of the Elementary Education Act, 1870.

At the hearing it was proved on the part of the prosecution—

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(1.) that the respondent supplied sand and gravel to Traynar; (2.) that Traynar was a contractor with the school board under a contract in writing for the building of schools at Stanwick, and that to the respondent's knowledge the sand and gravel were sold to Traynar to be used by him in the building of the schools; (3.) that part of the sand and gravel was delivered by the respondent at the site of the schools, and part was fetched from the respondent's sandpit by Traynar. A receipt in the respondent's handwriting for the price of the sand and gravel was produced. At the time in question the respondent was acting as chairman of the Stanwick School Board.

It was contended on the part of the prosecution that the respondent's action came within s. 34 of the Elementary Education Act, 1870, in that he was sharing or being concerned in the profits of the bargain or contract with Traynar or work done under the authority of the school board. It was not suggested that the respondent had made any excessive profit out of the sand and gravel supplied, and it was contended that the only place at Stanwick where sand and gravel could be purchased was from the respondent, and that if he had not supplied it the contractor would have had to go some miles to obtain a supply, which would have been more expensive owing to the cartage. The contractor admitted that he obtained the leave of the architect of the schools before using the respondent's sand and gravel, and that he paid the respondent the regular charges for them; the respondent was previously a stranger to him.

It was contended on the part of the respondent that the sand and gravel were such products of the soil as would come under the exception in s. 34, sub-s. 1, of the Elementary Education Act, 1870 (1), by analogy to the exception under s. 46, sub-

(1) By 33 & 34 Vict. c. 75 (The Elementary Education Act, 1870), s. 34, "No member of a school board, and no manager appointed by them, shall . . . . in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board or managers appointed by them: Provided that this section shall not apply to (1.) any sale of land or loan of money to a school board; or, (2.) any bargain or contract made with or work done by a company in which such member holds shares; (3.) the insertion of any advertisement relating

s. 2 (*a*), of the Local Government Act, 1894. It was also contended that the word "profits" governed the whole of s. 34 of the Act of 1870, and that the whole of the work done by Traynar was done under and in pursuance of his written contract with the school board, and that the respondent did not in any way share nor was he concerned in the profits of the contract. It was further contended that, even if the word "profits" did not govern the latter part of the section, the supply of sand and gravel to Traynar was not work done under the authority of the school board. The justices held that the respondent had not been guilty of any offence within s. 34 of the Act, and dismissed the information.

The question for the opinion of the Court was whether upon the facts of the case the decision of the justices was erroneous in point of law.

Austin Metcalfe, for the appellant. The respondent was concerned in the profits of a contract with the school board, or at any rate in work done under the authority of the school board, within the meaning of the section. It cannot be successfully contended that the sand and gravel were such products of the soil as to make the sale a sale of land, and therefore excepted under the proviso in s. 34. The case is really governed by *Nutton* v. *Wilson* (1), which was decided upon very similar words in the Public Health Act, 1875; that case is an authority for the proposition that the respondent was concerned in the profits of a contract with the school board. If that is not so, the supply of sand and gravel to Traynar was work done by the respondent under the authority of the school board.

Sells, for the respondent. This is a criminal offence, and the section must be construed strictly. The section does not

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to the affairs of any such school board in any newspaper in which such member has a share or interest; if he does not vote with respect to such sale, loan, bargain, contract, work or insertion.

"Any person who acts in contravention of this section shall be liable, on summary conviction, to a penalty not exceeding fifty pounds, and . . . . his office as member or manager shall be vacant."

(1) (1889) 22 Q. B. D. 744.

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prevent the supply of goods by a member of a school board to a contractor; it only forbids the member to share in the profits of a contract with, or of work done for, the board, and can only apply to a man in the position of a partner, or a quasi-partner, of the contractor. The word "profits" governs the whole section. There is nothing to shew that the respondent in any way shared in the profits of this contract, or that there was any profit on it; the respondent merely sold goods in the ordinary way to the contractor. To be within the section, a member of a school board must be interested in the contract itself. *Nutton* v. *Wilson* (1) is distinguishable. In that case the work was done under the contract itself; and, further, the prohibition in the Public Health Act is framed in very different language to that used in s. 34 of the Elementary Education Act, 1870. In *Le Feuvre* v. *Lankester* (2), a case under the Municipal Corporations Act, 1835, Coleridge J. laid it down that in order to bring a case within that statute the person sought to be disqualified "must directly or indirectly have a share or interest in some contract or employment"; and if that test is applied in the present case the respondent does not come within the section; the case stated by the justices really finds that he was not concerned in the profits of the contract.

Metcalfe, in reply, cited *Tomkins* v. *Jolliffe*. (3)

RIDLEY J. I am clearly of opinion that the decision of the justices was wrong, and that the respondent has brought himself within the operation of s. 34 of the Act of 1870. In this particular case our decision may be a matter for regret, but these proceedings are taken under an Act of Parliament which requires to be carefully and strictly construed, and in my judgment the respondent has unwittingly offended against the provisions of the section and ought to have been convicted, although there is no suggestion that what he did was done with a corrupt purpose or from a corrupt motive. The object of legislation of this nature was the subject of judicial discussion in *Nutton* v. *Wilson* (1), the facts of which case were

(1) 22 Q. B. D. 744. (2) (1854) 3 E. & B. 530.
(3) (1887) 51 J. P. 247.

somewhat, though not precisely, similar to those in the case before us. That was a proceeding to recover penalties under the Public Health Act, 1875, for acting as a member of a local board, although disqualified by reason of being concerned in contracts entered into by the board of which the defendant was a member, and the language used in that statute differed from the language in the section under consideration. That case, therefore, is not a precise authority in favour of the appellant's contention; but it shews the lines upon which similar statutory enactments have been construed. In that case Lindley L.J. said: "To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise." The object of the legislation under the Public Health Act, as construed by the learned Lord Justice, is the object of this enactment also, and his observations apply to the facts of the present case. The question for us in the present case is—whether the respondent shared or was concerned in the profits of a bargain or contract or work done under the authority of the school board. It is not necessary for me, nor do I desire, to interpret the expression "profits of a contract"; it may be argued that the profits with which the section deals are those of the contractor, and that the respondent was not the contractor. But it is clear that the respondent was concerned in "work done under the authority of the board," for he supplied goods for doing the work. The words "concerned in" are, as were the words in *Nutton* v. *Wilson* (1), general words, but in my opinion they clearly cover the supplying of materials for carrying out the work. I think therefore that, although no blame attaches to the respondent, he ought to have been convicted, and the case must go back to the justices with an intimation to that effect.

DARLING J. I am of the same opinion. The object of this legislation seems to be very clearly stated by Lindley L.J. in

(1) 22 Q. B. D. 744.

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his judgment in *Nutton* v. *Wilson* (1), and I entirely agree with the view there expressed. It is intended that members of public bodies shall be free from any suspicion of deriving profit, directly or indirectly, by reason of the position they hold. I think that what the respondent did was within the prohibition contained in the section.

Appeal allowed.

Solicitors for appellant: *Samuel Price & Sons, for Darnell & Price, Northampton.*

Solicitors for respondent: *Nicholson, Graham & Graham, for Heygate, Wellingborough.*

W. J. B.

C. A.

1899

Nov. 4.

[IN THE COURT OF APPEAL.]

DAGLISH *v.* BARTON.

Practice—Appeal—Trial before Official Referee—Application to Divisional Court—Appeal from Divisional Court—Leave to Appeal—Judicature Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5.

Where an action has been referred to an official referee, a motion to a Divisional Court to review the findings of the official referee and to enter judgment accordingly is "an appeal to the High Court from any court or person" within the meaning of s. 1, sub-s. 5, of the Judicature Act, 1894, and the decision of the Divisional Court is therefore final, unless leave be given to appeal.

APPEAL from a judgment of a Divisional Court (Darling and Phillimore JJ.) upon a motion to set aside the findings and judgment of an official referee and to enter judgment accordingly.

Edward Bray (*R. M. Bray, Q.C.*, with him), for the defendant, took a preliminary objection that the appeal would not lie without leave. By s. 1, sub-s. 5, of the Judicature Act, 1894 (2), the determination by a Divisional Court of an appeal as of

(1) 22 Q. B. D. 744.

(2) By 57 & 58 Vict. c. 16 (The Judicature Act, 1894), s. 1, sub-s. 5, "In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal."

right from any court or person is final, unless the unsuccessful party obtains leave to appeal. The official referee, if not a court, is certainly a person, and although the defendant's proceeding was in form a motion, it was in substance an appeal from the official referee.

Greer, for the plaintiff. Leave to appeal is unnecessary. The section was intended to limit the right of appealing where the appeal was originally brought from an inferior court. In the present case the motion was to set aside the judgment of the official referee, which is a judgment of the High Court; the proceeding was, therefore, not an appeal, but an application to the same Court to set aside its own order. [He referred to *Clark* v. *Sonnenschein* (1); *Munday* v. *Norton*. (2)]

A. L. SMITH L.J. I think that this preliminary objection must be allowed. This action, in which there was a counter-claim by the defendant, was sent to the official referee for determination, who found on both the claim and the counter-claim for the plaintiff; thereupon the defendant objected to the finding on the counter-claim, upon the ground that the official referee had not allowed him enough thereon. What could the defendant then do? He could only go to the Divisional Court, which was the sole tribunal that could put the official referee right if he had made a mistake. It is now said that, when the defendant went to the Divisional Court to set the official referee right, he was not appealing to that Court; I must, however, say for myself that I think the proceeding which he took was an appeal within the meaning of s. 1, sub-s. 5, of the Judicature Act, 1894. It has been urged that it was only a motion to the Divisional Court; but an appeal to a Divisional Court is now brought by motion, of which notice is given to the other party. Within a comparatively recent period an appeal from an inferior court used to be by means of a special case; now it is by way of motion; and the proceeding still remains an appeal, although it is brought by way of notice of motion.

It is contended that the official referee is the High Court, and that, therefore, there can be in strictness no appeal from

(1) (1890) 25 Q. B. D. 464. (2) [1892] 1 Q. B. 403.

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A. L. Smith L.J.

the official referee. But the official referee is only a limb of the High Court, and to say that he is the High Court, in my judgment, is not the truth and not common sense. The first question for us is whether a person aggrieved by a decision of an official referee has a right of appeal to the Divisional Court. I think that the answer must plainly be in the affirmative; it is not necessary for him to obtain leave from the official referee; he is entitled to go to the Divisional Court and say that the official referee has gone wrong. The case comes, therefore, within the first words of the section. Then subss. 1 to 4 point out in what cases there can and cannot be appeals, while sub-s. 5 uses the sweeping words, "in all cases in which there is a right of appeal to the High Court from any court or person." It cannot be doubted that the official referee is a person, whether he is a court or not. The subsection goes on: "the appeal shall be heard and determined by a Divisional Court." It is obvious that there was a reason for preventing a litigant from appealing without hindrance from an official receiver through the Divisional Court and Court of Appeal up to the House of Lords—a right which, if not expressly taken away, became his of necessity after he had got the right to appeal to the Divisional Court. The sub-section, therefore, uses very clear language for this purpose: "and the determination thereof by the Divisional Court shall be final"; nothing can possibly be clearer; and then finally comes the exception, "unless leave to appeal is given by that Court or by the Court of Appeal." There being then an appeal from the official referee to the Divisional Court, the latter part of the sub-section puts an end to any further appeal as a matter of right, though leave to go further may be given. I think, therefore, that the point taken on behalf of the defendant is a good one, and that the plaintiff has no right of appeal without leave to this Court. This appeal must be dismissed, without prejudice, however, to the right of the plaintiff to come before us and shew that the Divisional Court was wrong in refusing leave to appeal.

VAUGHAN WILLIAMS L.J. I do not dissent from the judgment of my learned brother, though I do not think the matter nearly

so clear as he does. I have felt, and still feel, some doubt as to the true meaning of sub-s. 5. I should hesitate to say that a motion to set aside a judgment directed by an official referee to be entered is an appeal. The official referee is part of the machinery of the court to try various questions, amongst others questions which cannot conveniently be disposed of in court. Originally where there was a reference to an official referee, he had no power to direct judgment to be entered; that power, however, he now possesses; but the judgment so entered is not his: it is the judgment of the Court, and is entered up by the official of the Court. I do not feel the same clearness as my learned brother that a motion to the Court to deal with the findings of an official referee (and this of course includes the variation of his direction to enter judgment) is an appeal within the meaning of the language of sub-s. 5. But the language is undoubtedly strong, and in substance I think that this proceeding is an appeal. The result of our decision is this: where a case in the Queen's Bench Division is tried in the ordinary way, a motion for a new trial is brought in the Court of Appeal; but where a case cannot conveniently be tried in court and is therefore tried before an official referee, then, if the Court adopts the findings of the official referee, in such a case (which is only a case in the Queen's Bench Division) there is no appeal as of right from the decision of the Divisional Court. I can understand that where, by statute or otherwise, there is a right of appeal to a Divisional Court—for instance, the appeal given from the decision of a county court judge sitting in bankruptcy—it is very desirable that the decision of the Divisional Court should be final, because in such cases the Divisional Court is really constituted the Court of Appeal for such matters. It is with some hesitation, therefore, that I hold that an application to a Divisional Court to vary the findings of an official referee is an appeal at all, though in substance of course it is one.

Preliminary objection allowed.

Solicitors for plaintiff: *Maples, Teesdale & Co., for Oppenheim & Malkin, St. Helen's.*

Solicitors for defendant: *Harper & Battcock.*

W. J. B.

1899
Nov. 3.

LONDON COUNTY COUNCIL *v.* READ.

Bread—Sale otherwise than by Weight—3 Geo. 4, c. cvi. s. 4.

By 3 Geo. 4, c. cvi. s. 4 (which applies in substance to the metropolitan area), any baker or seller of bread who sells or causes to be sold bread in any other manner than by weight is liable to a penalty.

The respondent, a grocer and general dealer, was asked by a purchaser for a twopenny loaf, and served him with a loaf for which he paid 2*d.* The loaf was not weighed in the shop in the purchaser's presence, nor was any statement made to him as to its weight, nor was there any evidence that it had ever been weighed. When subsequently weighed, the loaf, which resembled in shape and appearance a 2 lb. loaf, weighed $2\frac{3}{4}$ ozs. short of 2 lbs.:—

Held, that it was immaterial that the purchaser had not asked for a loaf of a specific weight, and that the respondent had sold bread otherwise than by weight within the meaning of the section.

CASE stated by justices for the county of London, from which the following facts appeared.

The respondent had appeared to answer a summons taken out upon the complaint of an inspector in the employ of the appellants charging him with having sold or caused to be sold bread in other manner than by weight, contrary to 3 Geo. 4, c. cvi. s. 4.

The respondent was a grocer and general dealer carrying on business at a shop in Fulham. On March 15, 1899, an inspector of the appellants in the course of his duties sent one Alfred Bond to purchase a loaf of bread at the respondent's shop. Bond asked for a twopenny loaf, and was served by the respondent with a loaf for which he paid 2*d.* The loaf was not, before being handed to him, weighed by any person in the shop in Bond's presence, nor was any statement made to him as to its weight. There was no evidence that the loaf ever had been weighed, but the respondent stated (though not on oath) that all the bread he sold at 2*d.* was weighed beforehand. The loaf was subsequently weighed by the inspector, and was found to weigh only $29\frac{1}{4}$ ozs., or $2\frac{3}{4}$ ozs. short of a 2 lb. loaf. The loaf was an ordinary cottage loaf, similar in shape and appearance to loaves which are usually sold as 2 lb. loaves.

The appellants contended that the loaf was under the circumstances sold otherwise than by weight, and that the respondent had been guilty of an offence against 3 Geo. 4, c. cvi. s. 4.

The respondent contended that he was not asked for bread by weight, but was asked for a twopenny loaf, and that he accordingly supplied one of that value. He further contended that he was not a baker, but a seller of bread; that he bought the particular loaf knowing it to be under 2 lbs., it having been made at about $1\frac{3}{4}$ lb. each loaf on purpose for sale at 2*d.* a loaf; that he could not afford to sell 2 lbs. in weight at 2*d.*, and that his price for 2 lb. loaves was $2\frac{1}{2}d.$ or $2\frac{3}{4}d.$, according to quality.

The justices were of opinion that if the purchaser had asked for a 2 lb. loaf they must have convicted the respondent, but that as he asked for a twopenny loaf they thought that the vendor was under no obligation to sell him 2 lbs., or any particular weight, of bread. They were further of opinion that, having regard to the statement of the respondent that the bread had been weighed at some time before the sale, although not by himself, in order to ascertain that it was under 2 lbs., so as to enable the vendor to sell at 2*d.*, the case came within 3 Geo. 4, c. cvi. s. 3, which provides that it shall be lawful for bakers or sellers of bread to make and sell, or offer for sale, or to deliver to his, her, or their customers, bread made of such weight or size as such bakers or sellers of bread shall think fit, any law or usage to the contrary notwithstanding. They therefore dismissed the summons.

The question for the opinion of the Court was whether the decision of the justices was right in law. (1)

(1) By 3 Geo. 4, c. cvi. s. 4, it is provided that "all bread sold within the limits aforesaid shall be sold by the several bakers or sellers of bread respectively within the said limits by weight; and in case any baker or seller of bread within the limits aforesaid shall sell, or cause to be sold, bread in any other manner than by weight, then and in such case every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding forty shillings . . . ."

The "limits aforesaid" referred to in the section are "the City of London and the liberties thereof, the weekly bills of mortality, and within ten miles of the Royal Exchange."

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Avory, for the appellants. The justices were wrong. The fact that the purchaser asked for bread without specifying the weight is no answer to the charge. It is clear that the respondent sold the bread, not by weight as required in terms by the Act, but by denomination. The case of *Hill* v. *Browning* (1), which was decided under the similar Act, 6 & 7 Will. 4, c. 37, s. 4, is directly in point.

The respondent did not appear.

RIDLEY J. I am of opinion that the decision of the justices was wrong, and that they ought to have convicted the respondent of the offence charged against him. It is a matter for regret that the case has not been argued on behalf of the respondent, but it is quite clear that the sale was not by weight as required by the Act, and it is immaterial that the purchaser did not ask for a loaf of a specific weight. The case must be remitted to the justices with this expression of our opinion.

DARLING J. I am of the same opinion.

Judgment for the appellants.

Solicitor for appellants: *Blaxland.*

(1) (1870) L. R. 5 Q. B. 453.

W. J. B.

THE QUEEN *v.* THE JUSTICES FOR THE WEST RIDING.

1899
Oct. 30.

Justices—Costs of Appeal to Quarter Sessions—Payment by Treasurer of County or Borough—Vagrant Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 9.

By s. 9 of the Vagrant Act, 1824, upon an appeal to quarter sessions against a conviction under the Act, the justices in quarter sessions are empowered to order the treasurer of "the county, riding, division, or place in which the offence shall have been committed," to pay the prosecutor's costs.

A county borough had a separate commission of the peace, but not a separate court of quarter sessions. An appeal from a conviction under the Act by the borough justices having been successfully brought to the quarter sessions for the county, an order was made by quarter sessions upon the borough treasurer for payment of the prosecutor's costs:—

Held, that the word "place" in the section must be construed as ejusdem generis with "county, riding, division," and meant a place having a separate court of quarter sessions; and that the order of quarter sessions was therefore wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county.

RULE NISI at the instance of the corporation of Huddersfield directed to the keepers of the peace and the justices for the West Riding of the county of York, calling upon them to shew cause why a writ of certiorari should not issue to remove an order made by them at the quarter sessions for the West Riding, holden at Wakefield, and why the said order, so far as it related to the payment of costs, should not be quashed.

From the affidavits it appeared that the borough of Huddersfield is a county borough within the meaning of that term as used in the Local Government Act, 1888, and has a separate commission of the peace, but has no separate court of general or quarter sessions. The expenses of the borough police force are defrayed out of the borough rate, and there is a treasurer of the borough fund appointed under the Municipal Corporations Act, 1882. Under an order of the Local Government Act Commissioners as to financial adjustments, the borough council from time to time pays to the county council of the West Riding such contribution towards the expenses of the

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county council as represents expenses incurred by it wholly or partly on behalf of the borough, including a proportion of the costs incidental to the assizes and quarter sessions of the county. Penalties levied by the borough justices are payable to the county treasurer of the West Riding.

In February, 1899, one Livesey and his wife were tried before the borough justices of Huddersfield upon a charge of palmistry, preferred under the Vagrant Act, 1824 (5 Geo. 4, c. 83), and were convicted; but upon appeal to the West Riding Quarter Sessions the appeal was allowed with costs, and the conviction quashed. The respondent to the appeal was J. H. Hall, a police inspector of the borough of Huddersfield. The justices in quarter sessions, after ordering the conviction to be quashed, further ordered that the treasurer of the county borough of Huddersfield should, within seven days after notice of the order, pay to the clerk of the peace for the West Riding, to be by him paid over to the appellants, the sum of 48*l.* 12*s.* 4*d.*, and to the respondent the sum of 40*l.* 13*s.*, by way of costs. The present rule nisi was subsequently obtained on the application of the corporation of Huddersfield.

Roskill, for the West Riding justices, shewed cause. The order was good. The costs of the prosecutor (in this case the respondent) upon an appeal to quarter sessions are dealt with by s. 9 of the Vagrant Act, 1824, which empowers the court of quarter sessions to order the treasurer of "the county, riding, division, or place in which the offence shall have been committed," to pay the prosecutor's costs. Huddersfield is the "place" where the offence was committed within the meaning of that section. The word "place" should be construed according to its natural meaning, and the section is satisfied if the place has a treasurer upon whom the order can be made. "Place" is not to be construed as ejusdem generis with the words "county, riding, division," immediately preceding, which would limit it to places having a separate court of quarter sessions. In *Reigate Corporation* v. *Hart* (1), which

(1) (1868) L. R. 3 Q. B. 244.

turned upon a direction in s. 31 of the Summary Jurisdiction Act, 1848, to pay penalties on conviction to the treasurer of the "county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted," it is true that the Court held that the words "liberty, city, borough, or place" must be read as ejusdem generis with "county, riding, division," and as being places having separate courts of quarter sessions. In that case, however, the words were, "for which such justice or justices shall have acted"; and justices acting in a borough which has no separate court of quarter sessions act as justices for the county, with their jurisdiction limited to a particular locality. There is the further distinction that in that case the borough had no separate commission of the peace. In *Reg.* v. *Dale* (1) and *Winn* v. *Mossman* (2), which raised the question of the application of penalties under the Alehouse Act, 1828, a similar interpretation was given to the words "liberty, city, borough, or place" for which the justices had acted. Here it is the place where the offence was committed, not the place for which the justices acted, that has to be considered, and those words are satisfied by a place having a separate commission of the peace and a treasurer of the borough fund, although it may not have a separate court of quarter sessions. Further, the order was rightly made under s. 27 of the Summary Jurisdiction Act, 1848, for the payment by the borough treasurer of the costs of the appellants; for the police inspector was only nominally a party to the appeal, the respondents being practically the corporation, who were therefore liable as the real party to the appeal to have an order for costs made against themselves or their proper officer.

T. P. Perks, for the appellants, contended that if the order as to payment of the appellants' costs was wrong, it might be amended under the provisions of Baines' Act (12 & 13 Vict. c. 45), s. 7.

Macmorran, Q.C. (*R. Cunningham Glen* with him), for the corporation of Huddersfield, in support of the rule. The order for costs was made without jurisdiction, and should have been

(1) (1853) 22 L. J. (M.C.) 44; Dears. C. C. 37.
(2) (1869) L. R. 4 Ex. 292.

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made on the county treasurer. The borough of Huddersfield, having only a separate commission of the peace and not a separate court of quarter sessions, is, for the purpose of the administration of justice, part of the county: *Reigate Corporation* v. *Hart* (1); for the purposes of quarter sessions it corresponds with the county at large, and this offence must be taken to have been committed in the county. The reasoning of the decisions in *Winn* v. *Mossman* (2) and *Reigate Corporation* v. *Hart* (1) applies to the present case, and the county fund, which gets the penalties, should be liable to the costs. As regards the costs of the appellants, the only jurisdiction is to order them to be paid by the other party to the appeal; the police inspector was not merely the nominal, but the actual respondent, for the corporation, having in mind the decision in *Tynemouth Corporation* v. *Attorney-General* (3) as to the power of a municipal corporation to pay the costs incurred by the chief constable in opposing licensing appeals, had declined to authorize the police inspector to appear for them.

RIDLEY J. I am of opinion that this rule should be made absolute. The facts are short. The appellants were alleged to have committed an offence against the Vagrant Act, 1824, and were convicted before the justices; but on appeal to the quarter sessions, to which an appeal lay under s. 14 of the Act, the conviction was quashed, and an order was made for payment of the costs of the appellants and also of the respondent, a police inspector, by the treasurer of the borough of Huddersfield. The question for us is whether this order was rightly made upon him as being the treasurer of the place in which the offence was committed, or whether it should have been made on the treasurer of the county fund. In my opinion it should have been made on the latter authority. It has been contended with much ingenuity that the place in which the offence was committed was the borough of Huddersfield, a place which has its own commission of the peace, though it

(1) L. R. 3 Q. B. 244. (2) L. R. 4 Ex. 292.
(3) [1899] A. C. 293.

has no separate court of quarter sessions, and that that is the meaning to be placed on the words "the place in which the offence shall have been committed" in s. 9 of the Vagrant Act. There is no authority precisely in point as to the meaning of those words in that section; but it is desirable that we should not work injustice by placing upon them a construction which would enable one authority to get the penalty if the conviction was upheld, while another had to pay the costs if it was quashed. It seems abundantly clear both upon decided cases and upon the language of the Act itself that the penalties go to the county, and it is unlikely that it was intended that the treasurer of the borough of Huddersfield should have to pay the costs when he cannot get the penalties upon any construction of the statute.

When we look at s. 14, which is the appeal section, we find a difference in the language used, for there the appeal is given to the quarter sessions for "the county, riding, division, or place in and for which such justice or justices shall have so acted." I think, however, that the difference of language in the two sections is not material, and that the words in s. 14 are used because of the nature of the subject-matter dealt with by the section. There is no magic in the words "for which the justices so acted." I should be inclined, in the absence of authority, to make the word "place" agree in meaning as far as possible with the preceding words, "county, riding, division," and that not merely because upon such an interpretation the costs would have to be paid by the same authority which received the penalties, but also because a harmonious construction would be placed on the section, which would give a like meaning to all the localities mentioned, and would make them all places having a separate court of quarter sessions. But there is some authority upon the point. The case of *Reigate Corporation* v. *Hart* (1) turned on s. 31 of the Summary Jurisdiction Act, 1848, and the decision dealt with the application of penalties under that section. In his judgment Blackburn J. cites with approval the following passage from the judgment of Jervis C.J. in *Reg.* v. *Dale* (2): "It

(1) L. R. 3 Q. B. 244. (2) 22 L. J. (M.C.) 44; Dears. C. C. 37.

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would be strange that the same word should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not be sustained." It is plain that it was not upon the presence of the words "for which such justice or justices shall have acted" that the Court relied, but that their decision proceeded upon the justice of the case, which required them to hold that the words "liberty, city, borough, or place" were limited to those which had a separate court of quarter sessions, so as to make them ejusdem generis with the preceding words, "county, riding, division." A similar point arose in *Winn* v. *Mossman* (1), and was dealt with in a similar way, it being held, under the same section, that it made no difference that in the one case the borough had, and in the other it had not, a separate commission of the peace. For these reasons I think that in s. 9 of the Vagrant Act the word "place" must be held to mean a place having a separate court of quarter sessions, and that these costs are therefore chargeable, not upon the borough, but upon the county, fund.

The costs of the appellants were also dealt with by this order, and were ordered to be paid by the treasurer of the borough. The right to make such an order depends on s. 27 of the Summary Jurisdiction Act, 1848, which deals with an order of quarter sessions upon "either party" to pay costs. It cannot be contended that the treasurer of the borough of Huddersfield was a party to the appeal; the police inspector was the respondent, and therefore the "party" to the appeal upon whom the order for costs should have been made; the court of quarter sessions had, therefore, no power to make that part of the order. It has been contended that the order may in that respect be amended, but I think that that contention is ill-founded, and that this is not a case of mistake within the meaning of Baines' Act.

DARLING J. I am of the same opinion. The question is what is the meaning of the language of s. 9 of the Vagrant

(1) L. R. 4 Ex. 292.

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Act, 1824, and whether under that section county justices at quarter sessions can make an order for costs on the treasurer of a borough having no separate court of quarter sessions. It seems to me that, if we construe this section without regard to the authority of decisions given upon other statutes, the construction that we ought to place upon it is to say that "place" means a place having a court of quarter sessions of its own. Similar language has received judicial interpretation in other cases, and "place" has been held to mean a borough in which a separate court of quarter sessions is held. In the present case we are asked to say that, though this is true with regard to the statutes in the cases which have been cited to us, yet in the present case there is something in the Act of Parliament which requires that a different construction should be placed upon it. In the cases cited to us, and especially in *Reigate Corporation* v. *Hart* (1), it was held, when construing very similar language, that "place" must be construed as ejusdem generis with the localities previously mentioned in the section, and having separate courts of quarter sessions. In the present case we avoid any inconsistency by holding that in s. 9 of the Vagrant Act "place" must be construed as ejusdem generis with "county, riding, division," which have separate quarter sessions of their own. I see nothing in the present case that should lead us to place a different construction upon the word. If there had been no appeal, or if the appeal had been dismissed, the penalty would have gone to the county, and not to the borough fund. But the parties convicted wished to appeal, and, there being no separate court of quarter sessions for the borough, their appeal lay to the quarter sessions of the county; it was successful, and then the quarter sessions were at liberty to order the prosecutor's costs to be paid by he treasurer of the place in which the offence was committed. What treasurer is there meant? I think the statute means that the county justices in quarter sessions may make an order on their own treasurer; there are certainly no express words empowering them to

(1) L. R. 3 Q. B. 244.

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make an order on the treasurer of any other body. I adopt the language used by Jervis C.J. in *Reg.* v. *Dale* (1): "The treasurer of the place meant in this section must clearly be treasurer of a place having a court of quarter sessions, an officer under the control of the justices making the order, with the fund under their control." If we are to decide in favour of the order made at quarter sessions, we must hold that the Legislature has proceeded on a wholly different principle in the Vagrant Act, and has by the use of the words "place in which the offence was committed" given to quarter sessions a power to make the order upon an officer not under their control. It would be a most extraordinary effect of the section that they should have power to do this when there is an officer under their own control upon whom the order might be made.

It is clear that the interpretation we are putting upon this section secures justice, and I confess that the fact that the opposite construction would work grievous injustice by making one body liable to costs although another body is entitled to the penalties weighs considerably with me, for it places a burden on the one without any corresponding benefit; this consideration weighed also with Lush J. in *Reigate Corporation* v. *Hart*. (2) This rule must, therefore, be made absolute.

Rule absolute for certiorari.

Solicitor for Huddersfield Corporation: *F. C. Lloyd, Huddersfield.*

Solicitors for West Riding justices: *Clements, Williams & Co., for Trevor Edwards, Wakefield.*

Solicitors for appellants: *Dodson & Co., Stainland, Halifax.*

(1) 22 L. J. (M.C.) 44.

(2) L. R. 3 Q. B. 244.

W. J. B.

[IN THE COMMERCIAL COURT.]

1899
Dec. 1, 11.

BRITISH MARINE MUTUAL INSURANCE COMPANY *v.* JENKINS AND OTHERS.

Insurance, Marine—Mutual Insurance Society—Action for Contributions—Insurance by Agent, Member of Association—Shipowner not Member—Liability.

The plaintiffs, a mutual insurance association, sued the defendants for contributions or premiums payable in respect of an insurance of the defendants' ship in the plaintiffs' club.

By the policy, which was in the form of a Lloyd's policy, and subject to the plaintiffs' memorandum and articles of association and rules, the defendants' manager insured the ship in his own name, and for, and in the names of, all persons to whom the same might appertain. By the memorandum one of the objects of the association was the mutual insurance "of ships which the members may be authorized to insure in their own names." The articles defined a member as any person who, on behalf of himself, or of any other person, insures any ship in the association, and empowered a committee of the association to assess the members rateably in order to provide a fund to meet losses, and stipulated that the association should not be liable for losses, except to the extent of the fund which it could recover from members or persons liable. The rules provided for payment of premiums, for which the ships were to be assessed.

The defendants authorized the manager of their ship to enter her in the club, which he did, and he so became a member of the club, within the meaning of the plaintiffs' memorandum and articles of association, and personally liable to pay the contributions or premiums, which, under the articles of association and the rules, might be levied by the committee of the club. He became insolvent, and unable to pay, and the plaintiffs sued the defendants, as being the persons on whose behalf, and for whose benefit, the insurance was effected:—

Held, that the defendants, being owners of an insurable interest, were the persons for whom the insurance was effected, that there was nothing in the memorandum and articles of association, or the rules, to exclude their liability to pay the premiums, and the plaintiffs were entitled to recover.

United Kingdom Mutual Steamship Assurance Association v. *Nevill*, (1887) 19 Q. B. D. 110, distinguished.

TRIAL of action in the Commercial Court before Bigham J.

The plaintiffs, the British Marine Mutual Insurance Company, sued the defendants, as owners of a ship called the *Vigil*, to recover the amount of certain contributions or premiums

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alleged to be payable by the defendants in respect of an insurance of the *Vigil* in the plaintiffs' club.

The defendants denied their liability, on the ground that the plaintiffs had agreed to look for payment of the contributions to the defendants' agent, William Grove, and not to the defendants.

The facts of the case, and the clauses in the policy of insurance, the plaintiffs' memorandum and articles of association, and the rules annexed to the policy, on the construction of which the decision turned, are set out in the judgment.

Joseph Walton, Q.C. (*James Fox* with him), for the plaintiffs. The defendants are liable to pay these premiums or contributions, for they are the persons who have an insurable interest in the ship, and it is their interest which is insured. The defendants will rely on *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (1), but that case is distinguishable, because there the policy contained special terms, the effect of which the Court held to be to exclude the liability of the defendants, whereas here the policy is in the form of a Lloyd's policy, and contains no terms which can exclude the ordinary liability of the owners of the vessel insured to pay the premiums. The defendants possess the insurable interest, without which the policy would be a wager policy and void, and the plaintiffs undertake the risk of loss in consideration of payment of the premiums. The documents in *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie* (2), and *Ocean Iron Steamship Insurance Association* v. *Leslie* (3), in both of which cases the plaintiffs were held to be entitled to recover, were more similar to those now before the Court than were the documents in *Nevill's Case.* (1) *Montgomerie* v. *United Kingdom Mutual Steamship Association* (4) was decided on the same ground as *Nevill's Case* (1), namely, that the parties had so contracted that the plaintiffs could not sue. There are no words to that effect in any of the documents in the present case.

(1) 19 Q. B. D. 110.
(2) (1889) 22 Q. B. D. 710.
(3) (1888) 22 Q. B. D. 722, n.
(4) [1891] 1 Q. B. 370.

F. Laing, Q.C. (*Balloch* with him), for some of the defendants, and *J. A. Hamilton* for others. The documents in the present case are in no material point different from those in *Nevill's Case* (1), and if the decision in that case is right the only person who can be made liable is a member of the association, and the plaintiffs here cannot recover against the defendants. The decision of the Court of Appeal in that case is binding on this Court, and the judgment of Fry L.J. in particular is favourable to the defendants' contention. There is no language giving a right to recover against shipowners who are not members of the association. The consideration for the plaintiffs undertaking the risk of losses was not payment by the defendants of the contributions, but the obtaining by the defendants of Grove's undertaking to pay. This is the consideration accepted by the plaintiffs, and the terms of the contract exclude any liability on the part of the defendants. The documents in the cases relied on by the plaintiffs are not so nearly identical with those in the present case as the documents were on which the defendants in *Nevill's Case* (1) succeeded.

Joseph Walton, Q.C., replied.

Cur. adv. vult.

Dec. 11. The following written judgment was delivered by

BIGHAM J. This is an action brought against the defendants, who are the owners of a ship called the *Vigil*, to recover the amount of the contributions or premiums payable in respect of an insurance of their ship in the plaintiffs' club.

The defence is that by the agreement sued on the plaintiffs have contracted with the defendants to look only to the defendants' agent for payment, and not to the defendants themselves. The question is whether that defence is made out.

The facts are quite simple. The defendants, wishing to effect an insurance with the plaintiffs, authorized one Grove, who was managing the ship on their behalf, to enter the *Vigil* in the club. Grove accordingly entered the ship, and so made himself a "member" of the club, within the meaning of the

(1) 19 Q. B. D. 110.

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memorandum and articles of association; and by reason of his membership he became personally liable to pay the contributions or premiums which, under the articles of association and the rules, might be levied by the committee of the club. Grove became insolvent, and was unable to pay, whereupon the plaintiffs brought this action against the defendants, as being the persons on whose behalf, and for whose benefit, the insurance had been effected.

It is necessary to remember that no one other than the defendants could have effected the insurance. They might do it by themselves, or they might do it through an agent acting for them. But they, in whom the interest existed, could alone effect the insurance; a contract entered into by any one who did not possess the interest would be a wager policy, and therefore void; thus when Grove entered the ship in the plaintiffs' club he effected a contract of insurance, the parties to which were the association on the one hand, and the defendants, whose interests were being insured, on the other. He might, at the same time, and in my opinion in this case he did, make himself personally responsible for the payment of the contributions; but the contract of insurance was, and could only be, between the parties I have named; if any losses occurred, within the meaning of the contract of insurance, they would have to be made good to the defendants, who alone were entitled to be indemnified, and they would have to be made good by the plaintiffs. What then was the consideration for the plaintiffs' promise to make good such losses? It must of course be a consideration moving from the defendants. Then what consideration? In the ordinary course of things one would expect the consideration to be the payment by the defendants of the contributions, or, in other words, of the price to be paid to the plaintiffs for taking the risk. Apart from any stipulation or practice embodied in the contract to the contrary, the person who gets the benefit under a contract is the person who pays for it. But it is said in this case on behalf of the defendants that the consideration consisted of their finding some one else (namely, Grove) to promise to pay, and that the plaintiffs accepted the procurement of this bare promise

(not its performance) as the consideration, and so contracted themselves out of their primâ facie right to look to the defendants. Such a consideration appears to me to be very improbable, but it is legally possible, and it is therefore necessary to examine the documents to see whether it is to be found in them.

The contract of insurance is required by law to be contained in a written policy. In this case the policy is made up of three documents, which are, (1.) the policy itself, (2.) the memorandum and articles of the plaintiff association, and (3.) the rules annexed to the policy. The first of these three, which, for convenience, I shall call the policy, begins in the ordinary old-fashioned Lloyd's form: "Know all men that William Grove, as well in his or their own name or names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance, and cause himself or themselves and them and every of them to be insured, &c." Now, beyond all doubt, the "persons" here referred to are the persons interested in the vessel, that is to say, the defendants; for by law they can be no others; they are "the assured." Then comes the valuation clause: "The said ship, for so much as concerns the assured" (the defendants), "by agreement between the assured and assurers in this policy, shall be valued at £——." This valuation not only fixes the amount to be paid in case of loss, but it also affords one of the data for calculating the amount of contributions or premiums payable in respect of the insurance. There is then the usual description of the perils which the plaintiffs are to bear, followed by the Lloyd's form of the sue and labour clause: "It shall be lawful to the assured" (the defendants) "to sue and labour in and about the recovery of the said ship . . . . to the charges of which the assurers promise to contribute." Then the policy finishes with these words: "And so the association is contented, and does hereby promise and bind itself to the assured" (the defendants) "for the true performance of the premises, subject to the articles and annexed rules of the association, which it is mutually agreed shall form part of, and be of the same force

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and effect as if inserted in the body of, this policy." These concluding words contain a clear promise by the plaintiffs to make good to the defendants any losses that may occur under the policy, and they give the defendants a right of action in case of breach. The policy, however, contains nothing to indicate what premiums are to be paid, or by whom, or when they are to be paid; in fact there is no reference to the consideration for the promise. It becomes necessary, therefore, in order to find out what the consideration is, and by whom it is to be paid, to refer to the incorporated documents. I take the memorandum and articles of association first. Clause 4 of the memorandum declares that one of the objects of the association is the mutual insurance "of ships which the members may be authorized to insure in their own names." Whose ships? Obviously the ships of those persons who authorize the insurance. And how are they to be "mutually" insured? One would naturally suppose by the owners, who give the authority, contributing among themselves to make good any losses that may happen. Thus the memorandum would seem to point to a liability on the part of each shipowner to contribute his share towards the losses; in other words, to pay the contributions or premiums levied in respect of his ship. The defendants, however, contend otherwise, and say that the ships are to be mutually insured by means of contributions or premiums to be paid by the agents who enter the ships in the club, and by no one else; in other words, by the "members" of the club. Now clause 4 of the articles of association defines a member to be any person who, on behalf of himself or any other person, insures any ship in the association; and clauses 44 and 46 empower a committee of the association to assess the members rateably, so as to provide a fund which shall be sufficient to meet losses. Clause 41 stipulates that the association shall not be liable to make good losses, except to the extent of the funds which it may be able to recover from the members or persons liable for the same. The defendants contend that the words "or persons liable for the same" in this rule mean the legal representatives of the members, as for instance their trustees in bankruptcy. There is some authority for this con-

tention to be found in the judgment of Fry L.J. in *Nevill's Case* (1), to which I shall have to refer hereafter. But for my own part, I see no reason why these words should not bear their plain meaning, and be taken as including the owners of the ships entered in the club, who would naturally be the persons liable. It is argued that, inasmuch as these clauses fix the members with liability (as I think they do), they impliedly relieve the shipowners from liability. I do not think they do anything of the kind. It by no means follows that, because the plaintiffs stipulate for and secure the responsibility of one class of persons (the members), therefore they release from liability the persons for whose sole benefit the association is giving its undertaking. The association has, in my opinion, a double remedy: one against the member, whom they have permitted to enter a ship on the terms that he should be personally responsible for the contributions, and another against the shipowners, on whose behalf, and for whose benefit, the insurance has been effected.

It remains, then, to examine the rules annexed to the policy, to see whether they make any difference. Rule I. declares that "these rules are subject to the memorandum and articles of association"; and Rule II., "that members shall mutually insure each other against risks." In the latter rule the word "members" must mean the persons who own the insured interest; for, as I have said before, no other persons can lawfully be insured in respect of it. Rules VII. to X. inclusive deal with the subject of premiums. Rule VII. provides that ships shall be divided into classes according to their age, and assessed upon their entered value at certain rates. Rule VIII. provides that when ships are employed in Southern trades they shall have a return of 50 per cent. of the premium. Rule IX. is as follows: "The managers are hereby empowered to levy contributions of one-fourth part of the annual premium as above, which shall be paid in cash on 1st April, July, October, and January in each year, such premiums of insurance to form a fund for the payment of claims and expenses." Rule X. provides that the "premiums on policies" shall be kept as a

(1) 19 Q. B. D. 110.

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separate fund, and in the event of the claims under the said policies exceeding such fund an additional percentage shall be levied, as per Rule VII., in such manner and at such time as the committee may determine; in the event of the separate fund being more than sufficient to meet claims the surplus is to be divided rateably among the members. These rules supply some of the deficiencies of the policy, for they settle what premiums are to be paid, and when they are to be paid; but they are silent as to who is to pay; "ships" are to be assessed for premiums, and "ships" are to be entitled to the return of 50 per cent. Does this silence indicate any intention that the persons for whose benefit, and on whose behalf, the insurances are effected shall not be liable? I think not. No doubt in practice the contributions or premiums are collected from "the members"—that is to say, from the persons who as agents enter the ships in the club, and they in turn get the money from their principals; but this practice does not affect the liability; that remains where by law it ought to be, namely, on the shipowner. There is, however, another rule which requires notice. It is Rule XV., which provides, amongst other things, that "A member shall be uninsured in respect of any interest entered, if he becomes bankrupt or insolvent, unless, before a claim accrues, an approved undertaking, registered by the managers, has been given to pay all contributions due or to become due." It is said that this rule shews that the member is alone liable, and that no undertaking would be necessary if the owners were also liable. I do not, however, agree. As I have said, the association has two remedies, one against the member, the other against the shipowner, and this rule is merely intended to provide a substitute for the member in the event of the latter becoming unable to pay; it does not in any way affect the shipowner's liability. Finally, it is to be observed that Rule XVII. in terms refers to the liability of the "owner" for premiums; it says, "In case of loss the owner shall be liable only for the amount of the twelve months' estimated annual premium on the policy under which the loss occurs." The owner here, in my opinion, means the shipowner, and the rule is intended to cut down, in the event

mentioned, a recognised liability on him for the payment of the contributions or premiums.

The conclusion, therefore, to which I arrive upon an examination of the documents, and apart from authority, is that the defendants are liable.

I am told, however, that the question is covered by the judgments in *Nevill's Case*. (1) In that case the action was brought (as here) to recover contributions from the shipowners, their agent, one Tully, who had entered the ship in the plaintiffs' club, having failed to pay; and it was held that, upon the true construction of the documents (consisting, as here, of the policy, the articles, and the rules), the plaintiffs had contracted with the defendants to look only to the agent. The articles and the rules in that case were practically identical with those which I have just been considering. But when the two policies are compared it will be seen that they differ materially. In *Nevill's Case* (1) the policy, instead of being in the ordinary Lloyd's form, was in a very special form, which began by reciting that Tully had become a member of the association, and that, having entered the steamer for insurance, he had become entitled to a policy; it then witnessed that, in consideration of the premises, and of the observance by the said insured (that is, by Tully) of the rules, the association did agree with the said insured that the members should, subject to a proviso thereinafter contained, be liable to make good all losses, &c. The proviso was to the effect that the policy was granted on the condition that the association should be liable only to the extent of so much of the funds as the said association might be able to recover from the members, and their heirs, executors, and administrators, liable for the same. That policy appears to me to be quite different in its meaning, as it certainly is in its wording, from the policy in the present case. In the policy before me the name of Grove only appears at the beginning, in the way in which the name of any insurance broker would appear in an ordinary Lloyd's policy; whereas in the policy in *Nevill's Case* (1) Tully is the person who is expressly named as the person who is to observe the rules, one

(1) 19 Q. B. D. 110.

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of which requires the payment of the premiums. In a more recent case, *Wyllie's Case* (1), Bowen L.J., examining the policy in *Nevill's Case* (2), says (3): "the policy treated Tully, the managing owner of the ship, as alone contracting with the association; it did not purport to be made on behalf of any one else. The association had contracted themselves out of the power of saying that any one but Tully was liable to them." The policy now before me does not treat Grove as alone contracting with the association; and it does purport to be made on behalf of others. In my opinion, the judgments in *Nevill's Case* (2) proceeded on the special wording of the policy, and afford no authority for saying that the defendants in this case are not liable.

There are two other authorities to be noticed, which, so far as they are applicable at all, go to support the plaintiffs' view. They are *Leslie's Case* (4) and *Wyllie's Case* (1), to which I have already referred. Both of them were actions to recover contributions from shipowners in cases where the agents who had entered the ships had made default in payment. The first of the two cases was tried by Mathew J. at the Newcastle Assizes in 1887, and in his judgment will be found a short, but very clear, history of mutual insurance. He examines *Nevill's Case* (2), and points out that the shipowners were parties to the contract by which Tully bound himself to pay, and that they took the benefit of the contract upon the footing that they were not to be looked to, but that their agent was, for the payment of the premiums; and he recalls the fact that this course is in a manner followed at Lloyd's, because a Lloyd's policy always recites (contrary to the fact) the payment of the premium by the assured, and then by the practice the underwriters look to the broker exclusively for the payment of the same. The recital and the practice together have the effect of shifting the liability from the shipowner to the broker. But he points out that in the policy before him there is no recital of the payment of the premiums, so that there is no discharge of the liability of the shipowner, and no contract that he shall

(1) 22 Q. B. D. 710.
(2) 19 Q. B. D. 110.
(3) 22 Q. B. D. at p. 721.
(4) 22 Q. B. D. 722, n.

be free in consideration of some one else taking the responsibility. No doubt in *Leslie's Case* (1) the policy contained an express provision that the shipowners (they are called the assured) shall pay the contributions: a provision which (in the opinion of the learned judge) cleared away all question as to the shipowners' liability; he adds, however, that they are liable, not merely on that ground, but also on the ground that they are the persons to whom the policy is issued, and who are to have the benefit of it. In *Wyllie's Case* (2) there was also a special clause in the policy by which the assured were made liable for the contributions. It was attempted to be said in that case, as in *Leslie's Case* (1), that the word "assured" meant the entering member and no one else. But the Court of Appeal held otherwise, and affirmed the judgment against the defendants. Neither of the cases is very much in point, because of the presence in the policies of the express clause fixing "the assured" with liability, a clause which is not to be found in the policy in the case before me. But looking at all three cases, *Nevill's Case* (3), *Leslie's Case* (1), and *Wyllie's Case* (2), I come to the conclusion that, in order to get rid of their primâ facie responsibility to pay the price of the benefit which they receive under their policy, the defendants must shew that their contract relieves them in unmistakable terms from such responsibility. The documents forming the policy in this case, when taken together, do not in my opinion shew anything of the kind.

There must be judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. & W. Stocken.*

Solicitors for defendants: *Spencer Chapman & Co., for Moy Evans & Thomas, Swansea; Richard White, for Hartland, Isaac & Watkins, Swansea.*

(1) 22 Q. B. D. 722, n. (2) 22 Q. B. D. 710.
(3) 19 Q. B. D. 110.

P. B. H.

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[IN THE COURT OF APPEAL.]

MULLER & CO.'S MARGARINE, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Goodwill — Contract "made" in the United Kingdom—"Equitable Interest in Property"—"Property locally situate out of the United Kingdom"—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), s. 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except . . . . (inter alia) property locally situate out of the United Kingdom" is chargeable with the same ad valorem duty as if it were a conveyance on sale.

A contract is "made," within the meaning of that section, in that country in which the signature of the last necessary party to it is affixed.

A contract for the sale of an option to purchase property at a particular price is not a contract for the sale of an "equitable estate or interest in any property" within the section.

Where the goodwill of a business is sold together with the premises where the business is carried on for a lump sum the goodwill is primâ facie annexed to the premises, and, therefore, if the business premises so sold are situate abroad, and there are no circumstances to rebut the presumption of annexation, the goodwill also will be treated as "property locally situate out of the United Kingdom" within the meaning of that section.

West London Syndicate v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507, distinguished.

APPEAL from the judgment of a Divisional Court (Day and Lawrance JJ.) upon a case stated by the Commissioners of Inland Revenue.

1. On November 13, 1897, an instrument was presented on behalf of the appellants to the respondents under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the respondents as to the stamp duty with which the instrument was chargeable.

2. The instrument which was under seal, and was executed by the parties of the first, second, and third part at Amsterdam, and by the other parties thereto in England was (so far as is material to this appeal) as follows:—

"An agreement made the 4th day of October, 1897, between W. L. Muller of Oldenzaal, Holland, merchant (hereinafter called the 'vendor'), of the first part, L. Newman of the Phœnix Brewery, Notting Hill, London, of the second part, J. Wigley of Fernleigh, Stevenage, in the county of Herts, of the third part, the General Purposes Syndicate (No. 2), Limited, of the fourth part, and Muller & Co.'s Margarine, Limited, of the fifth part. Whereas the vendor carries on the business of a manufacturer of margarine and other butter substitutes and otherwise at Gildehaus, in Germany, under the style or firm of Muller & Co. And whereas the said L. Newman has acquired from the vendor the right to purchase the said business and assets thereof, other than stock-in-trade, and book and other debts as from the 1st of June, 1897, for the sum of 80,000*l.*, and the right to purchase the stock-in-trade at a valuation and hold the same in trust for the said J. Wigley. And whereas the said L. Newman, with the sanction of the said J. Wigley, has agreed to make over the said rights to the syndicate in consideration of debentures of the syndicate to the amount of 9500*l.* And whereas the company has been incorporated under the Companies Acts, 1862 to 1893, with the object (amongst others) of acquiring the said business. . . . . And whereas the syndicate is willing to sell to the company the said rights of purchase, and the vendor and the said L. Newman respectively, at the request and by the direction of the syndicate, have agreed to concur in these presents. And whereas the said stock-in-trade, as on the said 1st day of June, 1897, has been valued at 12,329*l.* And whereas by clause 3 of the articles of association of the company it is provided that the company shall enter into the agreement therein referred to being this agreement.

"Now it is hereby agreed as follows:—

"(1.) The vendor, by the direction of the said L. Newman and the said J. Wigley and the said syndicate respectively, shall sell, and the syndicate, in respect of its rights to purchase as aforesaid, shall sell, and the company shall purchase, as from the 1st day of June, 1897—First, the goodwill of the said business with the exclusive right to use the name of Muller & Co.

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as part of the name of the company and to represent the company as carrying on the said business in continuation of the vendor and in succession to him. Second, all the freehold hereditaments specified in the first schedule hereto" (namely, certain land with the factory and buildings erected thereon at Gildehaus, in Germany). "Thirdly, all the patents, patent rights, licences, and trade-marks specified in the second schedule hereto. Fourthly, all the plant, machinery, waterworks, electric and other apparatus, wagons, drays, carts, and other rolling stock, implements and utensils, fixtures, furniture, and chattels, belonging to the vendor and employed in the said business at Gildehaus aforesaid, except stock-in-trade. Fifthly, all pending contracts, engagements, and orders in connection with the said business. Sixthly, all books of account, documents, and papers relating to the manufacture and trade of the said business.

"(2.) The consideration for the said sale other than in respect of the said stock-in-trade shall be the sum of 122,500*l.*, whereof (*a*) 80,000*l.* shall be paid and satisfied to the vendor as being the said sum of 80,000*l.* payable by the syndicate to the vendor as aforesaid, which, as to 60,000*l.*, shall be paid in cash, and the balance thereof shall be satisfied by the allotment and issue to the vendor or his nominee of 5000 fully paid-up preference shares of 1*l.* each aforesaid, and 15,000 fully paid-up ordinary shares of 1*l.* each; and (*b*) 42,500*l.* shall be paid and satisfied to the syndicate in cash, or at the option of the company, in fully paid-up ordinary shares. The consideration for the sale of the said stock-in-trade shall be 12,329*l.* which, by the direction of the syndicate, shall be paid by the company to the vendor in cash."

The agreement contained a covenant (clause 11) on the part of the party of the first part not at any time thereafter to be engaged in any similar trade within fifty miles of the said freehold premises except a certain business carried on at Goor, in Holland.

3. It was conceded that the subject-matters of sale, secondly, fourthly, and sixthly described—namely, the freehold premises, the plant, &c., and books of account—were within the exceptions in s. 59, sub-s. 1, of the Stamp Act, 1891, and consequently

were not chargeable with ad valorem duty. It was conceded the subject-matter of sale thirdly described had no value.

4. The apportioned price of the properties sold applicable to the subject-matter firstly and fifthly above described was 77,418*l*. The respondents, being of opinion that the instrument was made in England, and that that which was sold under the name of goodwill was the exclusive right to use the name of Muller & Co. as part of the name of the purchasing company and to represent the company as carrying on the said business in continuation of the vendor as above mentioned, and also the covenant (clause 11) above referred to, held that the firstly described matters, as also the fifthly described, were property within the meaning of s. 59 of the Stamp Act, 1891, that neither of such matters fell within any of the exceptions contained in that section, and that they were consequently liable to ad valorem conveyance duty. They assessed the duty accordingly at the rate of 10*s*. per cent. upon the said sum of 77,418*l*., namely, 387*l*. 5*s*., and also with a fixed duty of 10*s*. in respect of the other matters not chargeable with ad valorem duty.

5. The applicants contended that no part of the goodwill was chargeable with ad valorem duty.

The questions for the opinion of the Court are:—

(1.) Whether the instrument is chargeable with the duty of 387*l*. 5*s*. in accordance with the assessment of the respondents.

(2.) If not, with what duty the instrument is chargeable.

The Divisional Court (Day and Lawrance JJ.) affirmed the decision of the commissioners.

The appellants appealed to the Court of Appeal.

A. T. Lawrence, Q.C., and *Compton Smith*, for the appellants. The contract was not "made in England" within the meaning of s. 59, sub-s. 1. (1) By the term "made" is to be understood

(1) By s. 59, sub-s. 1, of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal, or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands tenements hereditaments . . . . or property locally situate out of the United

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"wholly made"—that is to say, the contract must be executed both by the vendors and purchasers in this country. Here Muller & Co. executed the contract abroad, and they were the only vendors. The syndicate who signed in England were not vendors, but only concurring parties. Moreover, this contract was under seal, and there is a distinction in this respect between a contract under seal and one in writing not under seal. The latter is made where the offer is accepted by the affixing of the signature of the accepting party, but the former is made where the deed is executed so as to be operative, for which purpose it is not necessary that it should be executed by both parties. If a party assents to a deed which has been executed by the other party, and takes the benefit of it, the deed is operative from the date of such execution and assent, and he is bound by the covenants in it, although he has not executed it himself. Here the deed was executed by the vendor in Amsterdam, and was assented to by the appellants there as soon as it was handed to their agents for transmission to this country.

Assuming that the appellants are wrong on that point, the contract does not fall within the classes of contracts which are made taxable by the section. First, it was not a contract "for the sale of any equitable estate or interest in any property." The sale by Muller was of a legal interest only, and so far as the difference between the price at which Muller sold, 80,000*l.*, and that at which the appellants bought, 122,500*l.*, went into the pockets of the intermediaries, they did not sell any interest in property at all, whether equitable or otherwise. All that the intermediaries had to sell was an option. What they had acquired from the vendor Muller was nothing more than a right to dictate to him to whom he should sell. Secondly, the sale of the goodwill falls within the exception of "property locally situate out of the United Kingdom," that is to say, where the business premises were—at Gildehaus, in Germany. The

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Kingdom . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate interest or property contracted or agreed to be sold."

goodwill is annexed to the business premises. There is no such thing as goodwill in the abstract; it can have no existence except as connected with the business: *Robertson* v. *Quiddington*. (1) In *Austen* v. *Boys* (2) Lord Chelmsford said: "Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on." Here the whole of the customers of the business were in Germany. There are many authorities to the effect that on a mortgage of business premises the goodwill will pass to the mortgagee without express words.

Danckwerts (*Sir R. Finlay, S.-G.*, with him), for the Crown. The contract was made in England. Both the vendors and the purchasers executed it in England, for the real vendors were the syndicate. But in any case it is enough that the purchasers should have executed it in England. A contract is made where the last necessary signature is affixed. Here the contract was not complete until the purchasers were bound by it. Even assuming that the deed may have been to some extent operative before the appellants executed it, that is not enough. They could not at that date have been sued on the instrument alone, but only on the instrument coupled with their assent, which would have to be proved by extrinsic evidence. But for the purposes of the Stamp Act you must look at the document alone. It must be capable of being sued on by itself.

Then, if the contract was made in England, it was a contract for the sale of an equitable interest. The syndicate were the real owners in equity of the whole business, and they were the real vendors. The contract mentions only one price, namely, 122,500*l*. No doubt that sum was payable partly to one person and partly to another, but the only person who sold at that price was the syndicate. But even if the contention is wrong, that there was a sale of an equitable interest in the whole,

(1) (1860) 28 Beav. 529, at p. 535.
(2) (1858) 2 De G. & J. 626, at p. 635.

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there was at all events a sale of an equitable interest to the extent of the 42,500*l.* which the syndicate received as their share.

The goodwill was not locally situate abroad. Goodwill is a mere personal right to exploit a name, and cannot have a local situation anywhere. Nothing which is not visible and tangible can have a local situation. In *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1) it was held that a share in a patent granted in New South Wales and a sole licence to use in a district of that colony the invention protected by the patent were not property locally situate out of the United Kingdom. Lord Esher M.R. said: "The property here in question cannot be touched or seen or placed anywhere. It is incapable of being brought within the fair and true meaning of the words 'locally situate' or of being said to exist in any locality." And Lopes L.J. said: "I do not see how a share in a patent, or a licence to use a patent, which is not a visible or tangible thing, can be said to be locally situate anywhere." In *Benjamin Brooke & Co.* v. *Commissioners of Inland Revenue* (2), where by an agreement made in England an American firm of soap manufacturers sold their freehold works in the United States, together with the book-debts and goodwill, it was held that the contract for the sale of the goodwill was taxable under s. 59. Goodwill may be wholly unconnected with the premises, and there are no facts in the present case from which the Court can judicially hold that it is connected with them. If it were a retail business there might be some ground for suggesting such a connection; but here the business is wholesale, and it can make no difference to the customers whether the goods are manufactured at one place or at another. But even if the particular premises had to be occupied in order to enjoy the benefit of the goodwill, that would not shew that the goodwill was locally situate. In *West London Syndicate* v. *Inland Revenue Commissioners* (3), where an hotel-keeper contracted to sell the goodwill of his business together with the lease of the hotel for a lump sum, it was held that the contract was

(1) [1897] 1 Q. B. 175. (2) [1896] 2 Q. B. 356.
(3) [1898] 2 Q. B. 507.

liable to ad valorem duty in respect of the value of the goodwill.

A. T. Lawrence, Q.C., in reply.

A. L. SMITH L.J. The first question which arises on this appeal is whether the agreement dated October 4, 1897, comes within the operation of s. 59, sub-s. 1, of the Stamp Act, 1891, as being a "contract or agreement made in England." It was contended on behalf of the appellants that it does not. It was urged that the agreement was made in Amsterdam. The document containing that agreement was signed by Muller, the vendor, and by the intermediaries, Newman and Wigley, in Amsterdam, and it was not signed by the syndicate, which came into existence for the purpose of bringing out the appellant company, nor by the appellant company itself until after the document reached this country. On those facts it was contended for the Crown that the real vendors were the syndicate, and that as both they and the company, the vendees, signed the document in this country, it was an agreement made in England, and so within the section. On the other hand, it was argued for the appellant company, in the alternative, that either the real vendees were Newman and Wigley, in which case the document was signed by both vendor and vendees abroad, or else that, if the appellant company were to be treated as the vendees, they assented to the agreement before it was signed by Muller, and that upon its being so signed by him it became a complete agreement binding upon both parties, even before it received the signature of the vendees. With regard to these contentions, I may say that I do not agree either that the syndicate were the real vendors, or that Newman and Wigley were the real vendees. I think it is clear that, on the one hand, the real vendor was Muller, who carried on the business of the margarine manufactory in Germany, while, on the other, the real vendees were the appellant company. With regard to the appellants' alternative contention, I think it is unnecessary for us to embark upon any inquiry as to whether there was such an assent by the vendees to the document before the vendor's signature was affixed as

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A. L. Smith L.J.

to make it enforceable. The question is, where was the document made. And I do not think it can be said to have been made until it was signed by the vendees. It was signed by them in this country. Therefore, in my judgment, it was a "contract or agreement made in England." On that point the contention of the Crown is right. The next question is, whether it was an agreement for the sale of an "equitable estate or interest" in property. On that point Mr. Danckwerts' contention was that the syndicate were the vendors, and that the only interest in the property that they had to sell was an equitable one. I have already intimated, when dealing with the first question (although it was unnecessary for me then to decide the point), that in my opinion the real vendor was Muller, and not the syndicate. It seems to me perfectly plain from the recitals in this agreement that what the intermediate parties had acquired from the vendor was not any estate or interest in the property at all, but a mere option or right to purchase, and it was only that option or right to purchase which they transferred. The Crown's contention on this point, therefore, fails. But then comes the question whether the sale of the goodwill was not a sale of an interest in "property locally situate out of the United Kingdom," because, if it was, the Crown by this section cannot be entitled to the duty claimed. There is no doubt that goodwill is "property." It has been so held over and over again. But the question is whether it has under the circumstances a local situation. Now, the goodwill in question is that of the business of Muller & Co., manufacturers of margarine and other butter substitutes at Gildehaus, in Germany, and it is sold under this agreement, together with (amongst other things) the land, factory, and buildings at which the business was carried on. Under these circumstances I cannot resist the conclusion that the goodwill was inherent in the premises and the manufactory at Gildehaus, and that it consequently had a local situation which was out of the United Kingdom. We were much pressed with the case of *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1), where it

(1) [1897] 1 Q. B. 175.

was held that a sole licence to use a patent in a particular district of New South Wales was not locally situate out of the United Kingdom. The Court went, indeed, upon the ground that a patent or a licence to use a patent, not being a visible and tangible thing, could not be said to be locally situate anywhere. But the Court were dealing there with a purely personal right, and I do not think that they intended to exclude from the category of property having a local situation rights which, though not visible and tangible themselves, are nevertheless annexed to and inherent in certain other property which is. That case therefore does not, in my opinion, conflict with our decision, which must be for the appellant.

COLLINS L.J. I am of the same opinion. The first point made by Mr. Lawrence was that this document was not a "contract or agreement made in England," and therefore did not fall within s. 59. Now, it is to be observed that what the Stamp Act deals with is not the bargain which arises out of the consent of the parties, but the instrument which records that bargain; and I think that the contract contemplated by that Act cannot be deemed to have been made until all the persons whose signatures are necessary to its complete validity as an instrument have authenticated it by putting their names to it. Unless they do so the document is not complete, as evidencing that which it is essential it should evidence on its face, namely, the consent of the parties. It is not enough for the purpose of the Stamp Act that the consent should be capable of being evidenced aliunde. In my opinion, a contract is "made," within the meaning of s. 59, where the signature of the last necessary party is affixed. I think, therefore, that the contract in the present case was not a complete instrument until it was sealed by the appellant company, and that, as their seal was affixed here, it was a contract made in England. Therefore Mr. Lawrence's first point fails. The next question is, whether this agreement was an agreement for the sale of an "equitable estate or interest in any property." Mr. Danckwerts contended that even if (contrary to his contention) Muller was to be regarded as the vendor of the whole of the

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Collins L.J.

legal interest to the company, still, as he did not get the whole of the purchase-money, the rights which the syndicate parted with as the consideration for the balance of the purchase-money must have been an equitable interest, and the agreement must have been an agreement for the sale of an equitable interest to the extent of 42,000*l*. But with that contention I cannot agree. I do not think that an option to purchase at a particular price can be properly described as an equitable estate or interest in property. But there remains the further question, whether the sale of the goodwill was not a sale of property locally situate out of the United Kingdom. There is no doubt some difficulty in the way of holding that goodwill can be said to be locally situate anywhere—a difficulty which arises to some extent from two decisions of this Court. It has been decided in *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1), that a licence to use a patent within a certain limited area, although capable of being described as property, could not be said to be property locally situate. It is settled by that decision that the fact of the property being enjoyed in a particular place is not enough to give it a local situation, and consequently the fact so much relied on by Mr. Lawrence, that the fruit of the goodwill here consisted in the practice of selling the margarine to persons in Germany, does not conclude the present question. I am of opinion that goodwill cannot be said to be locally situate unless it is annexed to the premises where the business is carried on. Then are we to consider that the goodwill in this case was annexed to the premises at Gildehaus? The decision of this Court in *West London Syndicate* v. *Inland Revenue Commissioners* (2), at first sight and until the decision is carefully examined, seems to create some difficulty in the way of so holding. In that case the goodwill of the hotel-keeper's business was, together with the hotel premises to which it was primâ facie annexed, sold for a lump sum, yet notwithstanding that fact the majority of the Court held that the goodwill was severable, and in fact severed, from the premises, and they allowed the duty to be charged on that footing. But the

(1) [1897] 1 Q. B. 175. (2) [1898] 2 Q. B. 507.

explanation of that decision is that there the hotel premises were only leasehold, and the vendor of the goodwill was the tenant of that leasehold. He had not the right to assign the premises without the consent of his landlord, and did not in fact assign them at all, but only bound himself to constitute some person a trustee of the premises for the purchaser of the goodwill, and therefore technically and strictly in that case there was a sale of the goodwill apart from the premises. In the case before us also there is one lump sum charged for the goodwill, the premises where the manufacture is carried on, and the other subjects-matter of the sale; but here there are no facts such as there were in the *West London Syndicate Case* (1) to rebut the primâ facie presumption that the goodwill was annexed to the premises. For these reasons I think that on this last point the Crown fails, and that the appeal must be allowed.

VAUGHAN WILLIAMS L.J. I agree. I think the Crown is right upon the first point, on the ground that the contract was made within the meaning of s. 59, not when the deed was executed in Amsterdam by the vendor, but when it was executed by the other parties in England. Although I am of this opinion, I wish emphatically to say for myself that I in no way assent to Mr. Danckwerts' argument that the deed could have no obligatory effect except upon the persons who executed it in Amsterdam until the execution of it in England by the other parties. As I understand the case stated here, it is open to any one to draw the inference that the company had assented to the deed before it was executed, in the sense that immediately upon the delivery of it to them, or to agents on their behalf, and acceptance of it by them, they would be bound by the agreement therein contained, and could not set up as negativing their obligation the mere fact that they had not executed the deed. But I agree that the question we have to deal with here is, not when was there first an obligation, but when was there a document executed coming within

(1) [1898] 2 Q. B. 507.

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s. 59; and upon that question I entirely agree that there was no such document until the execution in England by the vendees.

Upon the question whether this was a contract for the sale of property locally situate out of the United Kingdom, I should like to add a few words with reference to the case of *Smelting Company of Australia* v. *Commissioners of Inland Revenue*. (1) It has been contended by Mr. Danckwerts that the effect of that decision is that an intangible right cannot have a local situation. But I do not so understand that decision. The observations which were there made as to the impossibility of a thing which was not physical and tangible having a local situation were no doubt very appropriate with reference to the case with which the Court were there dealing; but there is nothing in those observations which leads me to suppose that, in any case in which you find an intangible right annexed to realty, or to anything else which itself has a local situation, the right annexed may not have the same local situation as the thing to which it is annexed. If that decision is to be read as Mr. Danckwerts suggests, the effect would be that an easement in property situate abroad could not be said to have any local situation. I agree that the fact that the exercise of a mere personal right is confined to a certain area is not sufficient to give that right a local situation. But it is quite another matter when the right in question is annexed to something which itself has a local situation. With regard to the case of *West London Syndicate* v. *Inland Revenue Commissioners* (2), I wish to point out that it was there held by the majority of the Court that not only was the goodwill severable from the business premises, but that the parties had in fact severed it. There were, no doubt, many circumstances there to lead to that conclusion which are not present here, and in particular the fact that it was clearly the intention of the parties in that case that the contract for the sale of the goodwill should take effect and be acted upon, even though it should turn out that, by reason of the absence of the landlord's consent, it was impossible to

(1) [1897] 1 Q. B. 175.

(2) [1898] 2 Q. B. 507.

deal with the leasehold premises at all—premises as to which the inference was that the parties put no value upon the lease at all, but treated it as a subject which was onerous rather than beneficial. In the present case, however, I can see nothing to lead me to suppose that the parties had any intention of severing the goodwill from the business premises to which they were primâ facie annexed. Mr. Danckwerts contended that it was enough if they were severable. It might with equal justice be contended that if there were a tax on cream, and you found some one dealing with milk, you might say that the milk was taxable because you can separate cream from it. In fact, the goodwill here has not been separated, and therefore is not the subject of stamp duty under s. 59.

Appeal allowed.

Solicitor for appellants: *H. A. Graham.*
Solicitor for respondents: *Solicitor to Inland Revenue.*

J. F. C.

1899
Dec. 18.

THOMAS WELSH & SON, APPELLANTS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF WEST HAM, RESPONDENTS.

Local Government—Offences—Continuing Offence—Work executed in Contravention of By-law—Continuance in same State—Builder without Power to remedy Breach—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), s. 158.

By the Public Health Act, 1875, s. 158, where the execution of any work is an offence, in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence.

A builder was convicted for building a house without sufficient air space, contrary to a by-law. The builder was not the owner, and had not been in possession, nor had any right to go on the premises after the conviction. Afterwards the builder was prosecuted for a continuing offence in respect of the continuance of the work in the same state, in contravention of the by-law, and convicted.

On a case stated :—

Held, that the builder, having no power to remedy the breach complained of, was not guilty of a continuing offence, and the conviction was wrong.

CASE stated by the deputy stipendiary magistrate for the borough of West Ham.

An information was laid by the respondents, as the urban sanitary authority, against the appellants, charging that the appellants, having been convicted and fined on November 30, 1898, for that they, on September 3, 1898, unlawfully did break a certain by-law, No. 63, of the urban authority of the borough, with respect to the sufficiency of the air space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings, by erecting a certain new dwelling-house, to wit the Dew Drop Inn, without providing the air space required by the by-law, did break the aforesaid by-law, No. 63, by continuing the offence after the date of the conviction for a number of days after written notice in that behalf from the urban sanitary authority, contrary to the by-law, and to the statute in such case made and provided.

Upon the hearing of the information no evidence was tendered on either side, but the following facts were admitted. That the Dew Drop Inn, the building in question, was not, and never had been, the property of the appellants, that the appellants were builders, and that the building in question was rebuilt by them for the Commercial Brewery Company, Limited. That the appellants were not, and had not been, in possession of the building or premises since the date of the conviction, November 30, 1898, and had no right, power or authority to go upon the premises after the date of the conviction. The conviction was admitted. It was also admitted that the building and premises were in the same condition as on September 3, 1898, and as on the date of the above conviction. The by-laws were admitted, also notice of January 20, 1899, by the respondents to the appellants, and the authority of respondents to take proceedings.

On the part of the appellants it was contended that the facts admitted did not constitute a continuing offence, under the by-law, and s. 158 of the Public Health Act, 1875 (1), for which the appellants were or could be made liable, as they were not, and never had been, owners, and they were not in possession or control of the building or premises at any time subsequent to the conviction on November 30, 1898, and could not comply with the notice of January 20, 1899, without committing a trespass, and that the appellants could not remedy the breach complained of.

On the part of the respondents it was contended that the building and premises, being in the same condition as on

(1) 38 & 39 Vict. c. 55. Sect. 158 empowers the urban authority to pull down or remove works commenced without their approval, and not being in conformity with their by-laws, and provides for the recovery of expenses. The section continues as follows: "Where an urban authority may under this section pull down or remove any work begun or executed in contravention of any by-law, or where the beginning or the execution of the work is an offence, in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken."

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September 3, 1898, and as on November 30, 1898, the date of the conviction, the appellants had committed a continuing offence under the by-law and s. 158 of the Public Health Act, 1875, for which continuing offence they were liable to be convicted.

The magistrate was of opinion that s. 158 of the Public Health Act, 1875, combined with the cases of *Rumball* v. *Schmidt* (1) and *Reay* v. *Gateshead Corporation* (2), made the existence of the building in the condition above stated a continuing offence, and that the appellants were liable to be convicted, and he accordingly convicted them.

The question for the opinion of the Court was, whether the magistrate, upon the above statement of facts, and on the above contention of law, came to a correct determination and decision in point of law; and, if not, what should be done in the premises.

Houghton, for the appellants. The conviction was wrong. There was no continuing offence on the part of the appellants, for it is expressly found in the case that they had no power to go upon the premises, so that it would have been impossible for them to remedy the breach of the by-law in respect of which they were prosecuted without committing a trespass. It would be most unjust that they should be placed in the position of being compelled to commit a trespass in order to avoid liability to fine or imprisonment, and there is nothing to that effect in s. 158 of the Public Health Act, 1875. The local authority should proceed against the owners. In the present case it is well known who the owners are; but in any case there would be no difficulty in finding out who the owner is, for by s. 306 of the Act the occupier is bound to disclose the name of the owner to the local authority under a penalty. *Rumball* v. *Schmidt* (1) was decided on a different section of the Act, s. 156 (3), and in that case the appellant was the owner, and could have complied with the notice. *Smith* v. *Legg* (4) was decided on a different statute; but the reasoning

(1) (1882) 8 Q. B. D. 603.
(2) (1886) 55 L. T. (N.S.) 92.
(3) Since repealed by 51 & 52 Vict. c. 52, s. 3.
(4) [1893] 1 Q. B. 398.

in the judgments is applicable to the present case. [He also referred to *Marshall* v. *Smith* (1); *Reay* v. *Gateshead Corporation* (2); *Wallen* v. *Lister* (3); *London County Council* v. *Worley*. (4)]

Gwynne James (*Asquith, Q.C.*, with him), for the respondents. The magistrate's decision was right. Sect. 158 of the Public Health Act, 1875, was passed to meet the decision in *Marshall* v. *Smith* (1), and alters the law as laid down in that case. The effect of s. 158 is to give power to go on the land for the purpose of complying with the notice. The respondents' contention is strongly supported by *Rumball* v. *Schmidt* (5) and *Reay* v. *Gateshead Corporation* (2), and especially by the language of Hawkins J. in the latter case. The limitation of one year at the end of s. 158 obviates the suggested hardship. The other authorities relied on for the appellants did not turn on the same statute, and are not in point.

Houghton was not heard in reply.

DARLING J. The appellants are found by the case stated to have been convicted for building a house called the Dew Drop Inn in such a manner as not to be in conformity with a by-law made by the respondents, the urban sanitary authority, and it is further found that the appellants were not, and had not been, in possession of the building or premises since the date of the first conviction, November 30, 1898, and had no right, power, or authority to go upon the premises after the date of that conviction. Afterwards, on January 20, 1899, a notice was given by the respondents to the appellants requiring them to put an end to the state of the building which was contrary to the by-law, and it was for failure to comply with this notice that the conviction now appealed from took place. It is contended on behalf of the appellants that, because they could not have complied with the notice without committing a trespass, therefore they are not liable to be convicted for having failed to comply with it. I think that contention is correct. The

(1) (1873) L. R. 8 C. P. 416.
(2) 55 L. T. (N.S.) 92.
(3) [1894] 1 Q. B. 312.
(4) [1894] 2 Q. B. 826.
(5) 8 Q. B. D. 603.

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respondents are in this dilemma: according to their contention s. 158 of the Public Health Act, 1875, makes the builders responsible for the continuing offence with which they are charged in the present case, while at the same time they cannot satisfy the obligation so imposed upon them without committing a trespass, for which they would also incur liability. If an obligation is imposed to obey the statute, and by so doing to violate the law of the land and commit a trespass, it must be imposed by s. 158, the words of which are: "Where the beginning or the execution of the work is an offence, in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence." It is contended that this section gives the appellants power to go on the land in order to comply with the notice, but there are no words to that effect. The local authority are right in the view they take that the existence of the work in the state in which it was in the present case amounted to a continuing offence; but the question is, by whom was the continuing offence committed? The builders, who are the appellants, did wrong in the first instance, and were fined; but when the subsequent notice was served on them they had gone away, and given up possession of the premises, and they could not have gone back without committing a trespass. The Act does not say that such a state of facts as occurred here shall amount to a continuing offence, so as to make the person who committed the original offence necessarily liable for the continuing offence. In such a case as the present the person liable is not the builder. I am, therefore, of opinion that the conviction was wrong.

CHANNELL J. I am of the same opinion, and it seems to me that this is a clear case. I can entertain no possible doubt that s. 158 of the Public Health Act, 1875, was passed in order to meet the case of *Marshall* v. *Smith* (1), in which the Court held that suffering a wall built of a less thickness than required by a by-law to remain unaltered was not a continuing

(1) L. R. 8 C. P. 416.

offence. The question raised in the present case is provided for by s. 158. That section does not say on whose part that which it deals with shall be a continuing offence. The Act might have said that the existence of the work in the state referred to should be a continuing offence on the part of the person who had been guilty of the original offence; but it has not said so. It is contended on behalf of the respondents that the Act must be assumed to have intended this, because it has limited the liability to one year after the offence has been committed, and that it was not enough for the person charged to shew that he could not do what the notice required, but that he was liable whether he could remedy the mischief or not; but I think the section means that the person liable for the continuing offence must be the person who actually continued it. The local authority must find out the owner of the premises, and if they cannot so much the worse for them, but they are assisted as to this by s. 306 of the Act. There is only one case in point, *Reay* v. *Gateshead Corporation* (1), in which language is attributed to Hawkins J. which would justify the decision of the magistrate in the present case. The words are: "if this section" (s. 158) "had been passed before the decision in *Marshall* v. *Smith* (2), there would have been no doubt at all that the penalties there would have been properly imposed." (3) But if one looks at the point decided in *Marshall* v. *Smith* (2), it is clear that this statement is not strictly accurate. It may not be correctly reported, but if the report is correct, it is clear that the learned judge could not have had the point with which we are now dealing present to his mind.

Judgment for the appellants.

Solicitor for appellants: *Albert Saunders.*
Solicitors for respondents: *Hillearys.*

(1) 55 L. T. (N.S.) 92. (2) L. R. 8 C. P. 416.
(3) 55 L. T. (N.S.) at p. 102.

P. B. H.

1900
Jan. 19.

LONDON COUNTY COUNCIL *v.* EAST LONDON WATERWORKS COMPANY.

Waterworks—London—Fire Hydrants—Right of Company to Use—User for Purposes other than extinguishing Fires—User without Consent of London County Council—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 3, 37–43—*Metropolitan Fire Brigade Act*, 1865 (28 & 29 *Vict. c.* 90), *s.* 32—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 34—*London County Council* (*General Powers*) *Act*, 1894 (57 & 58 *Vict. c. ccxii.*), *s.* 4.

Hydrants, fire-plugs, and other apparatus, provided by a metropolitan waterworks company, pursuant to the Metropolitan Fire Brigade Act, 1865, s. 32, and the Metropolis Water Act, 1871, s. 34, for supply of water in case of fire, may be used by the waterworks company, for purposes other than the supply of water for extinguishing fires, cleansing sewers and drains, cleansing and watering streets, or supplying public pumps, baths, and washhouses, without the consent of the London County Council, and may, by permission of the company, be used by persons other than the company.

Special Case, stated in an action, in which the plaintiffs claimed a declaration that hydrants, fire-plugs, and apparatus, provided, or to be provided, by the defendants, pursuant to the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 32, and the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 34, or either of those sections, ought not, in the absence of any agreement under the London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), s. 4, or, alternatively, without the consent of the London County Council, to be used for any purpose other than the supply of water for extinguishing fires, or, alternatively, for any purpose other than the supply of water for extinguishing fires and the purposes specified in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 37, and an injunction.

In and between the months of July and September, 1897, the streets in which the six hydrants, to which the action more particularly related, were situated, were in course of being paved with wood and channelled, and the defendants from time to time during those months, without having obtained or asked the consent of the plaintiffs, used, and allowed those engaged

in the operations of paving and channelling the streets to use, the hydrants for the purpose of obtaining, from the defendants' water-mains, by means of the hydrants, a supply of water for the operations.

The plaintiffs contended that the hydrants in question were provided at the public expense specially for the purpose of extinguishing fires, and could not, save pursuant to an agreement under the London County Council (General Powers) Act, 1894, s. 4, lawfully be used, or at any rate could not, without the consent of the plaintiffs, lawfully be used, for any purpose except to extinguish fires, or, alternatively, could not be used for any purpose other than the purposes specified in the Waterworks Clauses Act, s. 37, and ought not in any event to be used by persons other than the servants of the defendants. The defendants contended that they were entitled to themselves use, and to allow other persons to use, and that those other persons were entitled with the permission of the defendants to use, the hydrants, for all purposes, and at such times and in such manner as the defendants thought fit. The defendants had used, or permitted the user of, the hydrants, or some of them, for the following purposes, namely, for temporary supplies of water during paving, and other like works, and during severe frosts, and other exceptional circumstances, and had been requested to cease and discontinue that user, but had refused so to do, and continued to allow the user of the hydrants for the purposes above specified, and without any agreement with, or consent of, the plaintiffs.

The hydrants in question were provided by the defendants, at the request in writing of the Metropolitan Board of Works, made under the provisions of s. 32 of the Metropolitan Fire Brigade Act, 1865, and s. 34 of the Metropolis Water Act, 1871. The costs, charges, and expenses of the defendants in and about providing the hydrants had been paid to the defendants by the Metropolitan Board of Works, or by the plaintiffs as the successors of that board. In 1897 the cover of one of the hydrants required to be raised to the level of the new pavement; the work was executed by the defendants, and afterwards paid for by the plaintiffs; save in this one instance

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no works of maintenance or repair had been executed upon, or in connection with, any of the hydrants.

The hydrants in question were appliances attached to the water-mains, in districts where those mains were kept constantly filled with water under pressure, for the purpose of enabling water to be drawn from the main at the point where the hydrant was placed. In the defendants' district, as in most other parts of the metropolis, a constant supply of water under pressure is now afforded by the defendants, and consequent upon the introduction of the system of constant supply, and the invention of the hydrant, the old fire-plugs were replaced by hydrants.

Hydrants are designed and constructed with a view to their being certain in action and easy to manipulate, but, unless the valve which they include is properly replaced, there is a liability to leakage of water, and in cold weather to a possible disablement of the hydrant by the freezing of that water. The hydrants in question were of a pattern specially selected by the London County Council or their predecessors to meet the requirements of the Fire Brigade, and were periodically tested by the Fire Brigade.

The Acts of Parliament, by and under which the undertaking of the defendant company was regulated and carried on, incorporated all material provisions of the Waterworks Clauses Acts, which provide, inter alia, that the defendants shall allow all persons at all times to take and use water for extinguishing fire, without making compensation for the same, and further provide that the defendants and their undertaking shall be subject to the provisions of the Metropolis Water Acts.

The following sections of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), are material:—

Sect. 3: "The expression 'the town commissioners' shall mean the parties defined under that title in the special Act, and, where no such parties shall be there defined, shall mean the commissioners, trustees, or other parties, having the control or management of the streets under any Act for paving or improving the town or district to be supplied with water under the special Act."

Sect. 37: "In all the pipes to which any fire-plug shall be fixed the undertakers shall provide, and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes; that is to say, for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or washhouses, that may be established for the free use of the inhabitants, or paid for out of any poor-rates or borough rates levied within the limits of the special Act; and such supply shall be provided at such rates, in such quantities, and upon such terms and conditions, as may be agreed upon by the town commissioners and the undertakers, or, in case of disagreement, as shall be settled . . . . by two justices . . . . until . . . . an inspector shall have been appointed, and after the appointment of such inspector by the inspector so appointed."

By s. 38, the undertakers shall fix fire-plugs in the pipes for the supply of water for extinguishing fires.

By s. 39, the undertakers shall renew, and keep in order, the fire-plugs, and deposit keys where fire-engines are kept, and put up notices shewing the situations of the fire-plugs.

By s. 40, the cost of the fire-plugs and keys shall be defrayed by the town commissioners.

By s. 41, the undertakers shall place and maintain fire-plugs, for extinguishing fires only, near works or manufactories, at the request and expense of the owners or occupiers.

Sect. 42: "The undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same."

Sect. 43 imposes penalties on the undertakers for neglect or refusal to comply with the obligations imposed by the preceding sections.

By the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict.

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c. 90), s. 32, "All the powers now exercised by any local body or officer within the metropolis as respects fire-plugs shall henceforth be exercised by the Board, and the Board shall be entitled to receive copies or extracts of all plans kept by any water company under the provisions of 15 & 16 Vict. c. 84, and every such water company shall provide, at the expense of the Board, in any mains or pipes within the metropolis, plugs for the supply of water in case of fire, at such places, of such dimensions, and in such form as the Board may require, and the Fire Brigade shall be at liberty to make such use thereof as they may deem necessary for the purpose of extinguishing any fire; and every such company shall deposit keys of all their fire-plugs at such places as may be appointed by the Board, and the Board may put up on any house or building a public notice, in some conspicuous place in each street in which a fire-plug is situated, shewing its situation."

By the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 34, "Sect. 32 of the Metropolitan Fire Brigade Act, 1865, shall operate subject and according to the provisions following; that is to say:

"(1.) In that section, and in this provision, the term 'fire-plug,' and the term 'plug,' shall include hydrant, and all other apparatus necessary or proper in connection with the company's pipes for supply of water in case of fire.

"(2.) Where a company give a constant supply in any part of their water limits, they may, if they think fit, give notice thereof to the Metropolitan Board of Works.

"(3.) If the Metropolitan Board of Works do not, within two months after receipt of any such notice, specify, as regards that part of the company's water limits, what plugs for supply of water in case of fire, at what places, of what dimensions, and in what form, they require the company to provide, then, at any time after the expiration of that time, the company may, if they think fit, provide, in and for that part of their water limits, such plugs for supply of water in case of fire, at such places, of such dimensions, and in such form, as to the company seem necessary or proper.

"(4.) Thereupon, as regards that part of the company's

water limits, the company shall be deemed to have fully discharged all obligations imposed on them by the said s. 32.

"(5.) All plugs provided by a company in pursuance of this provision may, for the purposes of the Fire Brigade, be used as if they had been provided on the requisition of the Metropolitan Board of Works under the said s. 32."

Sub-s. 6 imposed the expense of providing plugs on the Metropolitan Board of Works.

The term "company" includes the defendants.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40, the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the plaintiffs, the London County Council.

By the London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), s. 4, "It shall be lawful for the council to enter into, and carry into effect, any agreement with the companies supplying water in London, and the vestries and district boards of works in London, or any of them respectively, with respect to the use of fire hydrants for flushing and other purposes. Provided that no agreement under this section with respect to any hydrant shall be valid, unless the company owning the main or pipe with which the hydrant is connected, and the local authority (if any) to whom the hydrant belongs, shall be a party thereto."

The questions for the opinion of the Court were—

(1.) Whether hydrants, fire-plugs, and apparatus, provided by the defendants pursuant to s. 32 of the Metropolitan Fire Brigade Act, 1865, $\frac{\text{and}}{\text{or}}$ s. 34 of the Metropolis Water Act, 1871, or pursuant to either of those sections, might, in the absence of any agreement under the London County Council (General Powers) Act, 1894, lawfully be used for any purpose or purposes in addition to the supply of water for extinguishing fires. And, if so—

(2.) Whether that additional user was limited to the purposes specified in s. 37 of the Waterworks Clauses Act, 1847, or to any and what other purposes.

(3.) Whether that additional user might take place without the consent of the London County Council thereto.

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(4.) Whether that right of user was confined to the defendants themselves, or might, with the permission of the defendants, be exercised by persons other than the defendants.

English Harrison, Q.C. (*Daldy* with him), for the plaintiffs. The general scheme of the several Acts of Parliament referred to in the special case is to confer on the London County Council complete control over the Metropolitan Fire Brigade, and in order to carry this object into effect it is essential that they should have the sole control and exclusive use of the hydrants and other apparatus provided for the purpose of extinguishing fires. The existence of the power to contract with the water companies with respect to the control of hydrants, conferred by s. 4 of the London County Council (General Powers) Act, 1894, shews that in the absence of any contract the control remains in the county council. It is important that the county council, who must necessarily employ skilled workmen, should have exclusive control, for, as appears from the case, if the hydrants are not properly attended to they are liable to get out of order, and to be disabled.

Cripps, Q.C. (*R. B. D. Acland* with him), for the defendants. The hydrants when fixed on the company's pipes are the property of the company, subject to certain express statutory provisions restricting the exclusive right of control, which the company would otherwise have. The plaintiffs are unable to shew any express statutory provision depriving the company of the right to use the hydrants, and the absence of any express provision to that effect, coupled with the presence of the other express provisions, shews that no further limitation of the rights of the company can be implied. In *Moore* v. *Lambeth Waterworks Co.* (1) Lord Esher M.R. said: "A fire-plug can always be used for flushing sewers, and I do not know of any Act of Parliament, which says that when a waterworks company are obliged to keep a fire-plug, they may not themselves use it for other purposes." (2)

English Harrison, Q.C., in reply. The passage from *Moore* v. *Lambeth Waterworks Co.* (2), which has been referred to, is

(1) (1886) 17 Q. B. D. 462. (2) 17 Q. B. D. at p. 465.

obiter dictum, for no question as to user of the fire-plug was raised in that case.

BRUCE J. The first question stated for the opinion of the Court is, whether hydrants, fire-plugs, and apparatus, provided by the defendants, pursuant to the Metropolitan Fire Brigade Act, 1865, s. 32, and the Metropolis Water Act, 1871, s. 34, or either of those sections, may, in the absence of any agreement under the London County Council (General Powers) Act, 1894, lawfully be used for any purpose in addition to the supply of water for extinguishing fires. I am of opinion that we ought to answer this question in the affirmative. I fail to see any provision the effect of which can be to limit the right of the defendants to use the hydrants as the plaintiffs contend that it is limited. There is nothing in any of the statutes referred to in the case, and to which our attention has been directed in argument, to limit the right of the waterworks company to use their own hydrants as they think fit, subject to the obligations expressly imposed upon them by those statutes. The second question is, whether the additional user is limited to the purposes specified in the Waterworks Clauses Act, 1847, s. 37, or to any and what other purposes. There is nothing to limit the user as suggested, and this question must be answered in the negative. The third question is, whether the additional user may take place without the consent of the London County Council. There is nothing to require the county council's consent, so our answer must be in the affirmative. The fourth question is, whether the right of user is confined to the defendants themselves, or may, with their consent, be exercised by other persons. The proper answer to that is that there is nothing to confine the right of user as suggested. The result is, that the plaintiffs have failed to make out their case, and the defendants are entitled to judgment.

PHILLIMORE J. I am of the same opinion. Various burdens and obligations are imposed on the waterworks company by the different statutes which have been referred to. One of these obligations is to fix and maintain fire-plugs, now hydrants.

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Phillimore J.

The company are also bound to keep their pipes charged, and to allow all persons to draw water from their pipes for extinguishing fires without demanding compensation, and to provide water for cleansing sewers and drains, for cleansing and watering the streets, and for supplying public pumps, baths, and washhouses, on the terms specified. All the different sections impose particular obligations, and the reasonable inference is, that there are no other obligations imposed in addition to those specified, for the whole matter is the creation of statute. There is nothing stated in the case to shew that any mischief is likely to arise from the hydrants being used by the waterworks company, who in any event would have the control of the hydrants and other apparatus. It is true that the hydrants were put up at the request, and at the expense, of the plaintiffs and their predecessors, but they were placed on the waterworks company's property, and they are the property of the waterworks company, subject to the right of access by the London County Council as being the municipal authority for the purpose of extinguishing fires. Our judgment therefore will be for the defendant company with costs.

Judgment for the defendants.

Solicitor for plaintiffs: *W. A. Blaxland.*
Solicitors for defendants: *Bircham & Co.*

P. B. H.

[IN THE COURT OF APPEAL.]

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PARRY *v.* LIVERPOOL MALT COMPANY.

Arbitration—Master and Servant—Contract for Service—Arbitration Clause—Wrongful Dismissal — Action for Damages — Staying Proceedings — Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

A contract for the employment of the plaintiff by the defendants as their agent for the sale of maize and other products for seven years, at a remuneration by commission, provided that "any dispute arising in connection with" the contract should be referred to arbitration pursuant to the arbitration clause in the by-laws of the Liverpool Corn Trade Association. The arbitration clause in those by-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators, and that neither contracting party should bring any action against the other in respect of any dispute until the dispute had been settled by the arbitrators. Disputes as to the plaintiff's conduct as agent were subsequently referred to arbitrators, who made an award adverse to the plaintiff, whereupon the defendants dismissed him. The plaintiff then brought an action against the defendants for damages for wrongful dismissal:—

Held, reversing Phillimore J., that the dispute in the action was within the arbitration clauses in the contract and by-laws, and that the defendants, having always been "ready and willing" to refer the dispute to arbitration, were entitled to have the action stayed under s. 4 of the Arbitration Act, 1889.

Renshaw v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, followed.

Davis v. *Starr*, (1889) 41 Ch. D. 242, explained.

THIS action had been brought in the Liverpool District Registry by the plaintiff for damages for his alleged wrongful dismissal from the defendants' employ as their agent.

Under an agreement in writing of December 20, 1897, made between the defendants, the Liverpool Malt Company, Limited, of the one part, and the plaintiff of the other part, the defendants appointed the plaintiff sole agent for the sale of maize, flaked malt and other products, except barley, manufactured or sold by the defendants for the use of brewers, distillers and maltsters in certain counties, for seven years until determined by twelve calendar months' notice in writing. The plaintiff on his part agreed to canvass for orders and make weekly returns in the form therein mentioned. The plaintiff's

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remuneration was to be by commission upon all orders obtained by him. The agreement concluded with the following clause (9): "Any dispute arising in connection with this agreement between the parties hereto shall be referred to arbitration in accordance with and subject to the provisions of the arbitration clause in the rules and by-laws of the Liverpool Corn Trade Association, Limited." The agreement contained no express clause empowering the defendants to dismiss the plaintiff for misconduct.

Clause 17 of the by-laws of the Liverpool Corn Trade Association provided that, "All disputes arising out of transactions connected with the trade, except such as arise out of the business of the Clearing House, shall be referred to two arbitrators, one to be chosen by each party in difference, the said arbitrators having power to call in a third in case they shall deem it necessary"; and that for the purpose of enforcing any award that rule, and any contract referring thereto, might be made a rule of Court. The clause also provided that neither contracting party should bring any action against the other in respect of any dispute until such dispute had been settled by the arbitrators. The plaintiff proceeded to act as the defendants' agent pursuant to his appointment, but in 1899 disputes arose between the parties as to whether the plaintiff had committed breaches of the agreement by neglecting to render accounts and to remit moneys in accordance with the agreement; whereupon, on October 24, 1899, the defendants sent the plaintiff a notice in writing, informing him that they had appointed an arbitrator on their side for the purpose of disposing of the dispute as to whether the plaintiff had or had not committed breaches of the agreement by neglecting or refusing to render accounts and returns in accordance with the provisions of the agreement, by wrongfully retaining moneys collected from the company's customers, by systematically neglecting to properly canvass districts of which he had been constituted sole agent, or otherwise; and the notice went on to require the plaintiff to appoint an arbitrator on his behalf, in default of which the questions in dispute would be referred to the president of the Liverpool Corn Trade Association,

Limited. The plaintiff then appointed an arbitrator, and the inquiry duly took place before both arbitrators, who, on November 10, 1899, made their award, finding that the plaintiff had neglected and refused to render accounts and returns in accordance with the agreement, that he had retained moneys collected from customers, but that the allegation of negligence in canvassing had not been proved; and they directed the costs of the award to be paid by the plaintiff.

On November 15, 1899, the defendants wrote to the plaintiff dismissing him from their employment, and on the same day sent out a circular to their customers informing them of his dismissal; whereupon, on the 17th, the plaintiff issued the writ in this action. The defendants then, on the 20th, took out a summons to stay all proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889, on the ground, as stated by affidavit, that the question in the action arose out of the agreement of December 20, 1897, and should be decided by arbitration in accordance with clause 9 thereof, and that the defendants were and had always been ready and willing to submit it to arbitration. The plaintiff, on the other hand, insisted that the action did not arise out of anything done by the company under the provisions of the agreement, but by reason of their wrongful determination of the same; that the question of wrongful dismissal, which was the subject of the action, was not such a dispute as was covered by the arbitration clause in the agreement or by rule 17 of the by-laws of the Liverpool Corn Trade Association, Limited, it not being "a dispute arising out of transactions connected with the trade" within that rule; that the arbitration tribunal had no jurisdiction to determine the question raised in the action, and was functus officio in respect of the matters relied upon by the defendants as justifying his dismissal. On November 24, 1899, the district registrar made an order on the summons staying all proceedings in the action; but on appeal to Phillimore J. in chambers on November 29 that order was set aside, leave being given to the defendants to appeal to the Court of Appeal.

The defendants now appealed from the order of Phillimore J.

The appeal was heard on December 19, 1899.

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Horridge, for the defendants. As the parties have agreed to refer "all disputes" to arbitration, and as the defendants were at the commencement of the action "ready and willing" to proceed to arbitration, they are entitled to have the action stayed under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49). The present dispute is covered by the arbitration clause, the question being whether the breaches found by the arbitrators were such as to justify the defendants in dismissing the plaintiff. No doubt the question can be decided by an action, but the defendants prefer the cheaper and better tribunal which the plaintiff has himself selected. Moreover, the agreement provides, by reference to clause 17 of the by-laws, and in accordance with *Scott* v. *Avery* (1), that no action shall be brought by either party until the matter in dispute has been decided by the arbitrators. Phillimore J. held that this case was governed by *Davis* v. *Starr* (2), and not by *Renshaw* v. *Queen Anne Mansions Co.* (3), but the defendants submit that it falls within the latter authority, for here, as in that case, the defendants were always "ready and willing" to arbitrate.

T. W. Chitty, and *A. P. Thomas*, for the plaintiff. This case comes within *Davis* v. *Starr* (2), where the facts were identical. In *Renshaw* v. *Queen Anne Mansions Co.* (3) the words "or otherwise" in the arbitration clause made the clause much wider than in the present case. Here, reading the arbitration clauses in the agreement and the by-law together, the disputes to be referred must be "disputes arising in connection with the agreement and out of transactions connected with the corn trade"; and it was never intended that the agreement should apply to such a case as this. Moreover, the agreement contains no reservation of the right to dismiss, as it did in *Renshaw's Case*. (3)

LINDLEY M.R. The arguments have satisfied me that in *Davis* v. *Starr* (2) this Court took a wrong view of the facts, though not, I think, of the law. The principle upon which we proceeded in that case was right enough, because we came to

(1) (1856) 5 H. L. C. 811. (2) 41 Ch. D. 242.
(3) [1897] 1 Q. B. 662.

the conclusion that the applicant there—a man who wanted to enforce the arbitration clause—was not, in the language of the Act, at the time when the proceedings were commenced, nor still remained, "ready and willing to do all things necessary to the proper conduct of the arbitration." Assuming that we were right on the facts, the decision was right enough. I now think that we took an erroneous view of the facts. I prefer myself the observations made and the view taken on similar facts in the later case of *Renshaw* v. *Queen Anne Mansions Co.* (1) Probably it was the view we took of the facts in *Davis* v. *Starr* (2) which unfortunately led to the present action being brought.

But, putting those cases aside, what is the answer to this appeal? There is really no answer to it when you come to consider the matter. The doubt which I had was whether there was anything to arbitrate upon, still less to bring an action upon, after the award. There is a contract between the disputants, the Liverpool Malt Company on the one side and Mr. Parry on the other, by which Mr. Parry was to act as agent of the company for the sale of maize and other things, except barley, and he agreed to act as such agent, and they agreed to employ him for seven years at a certain remuneration. Disputes arose, and those disputes were referred to arbitration. His employers were not satisfied with his conduct, and the result of the dispute was an award adverse to him, so adverse to him that I am surprised he should hope to get any damages by an action, or by arbitration, or otherwise. In my judgment that award, substantially and in point of law, puts an end to the whole matter. Then he brings an action, and the defendants say, "Well, but under your agreement there is this clause referring any dispute to arbitration in accordance with the arbitration clauses and the rules and by-laws of the Liverpool Corn Trade Association, Limited." Now, clause 17 of those by-laws says that "All disputes arising out of transactions connected with the trade, except such as arise out of business of the Clearing House, shall be referred to two arbitrators," and so on. I cannot agree with the ingenious suggestion of

(1) [1897] 1 Q. B. 662. (2) 41 Ch. D. 242.

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Mr. Thomas that, in construing this agreement, you are to limit it to "any dispute arising in connection with this agreement and such transactions in the trade as are referred to in the by-laws." I do not think that is the true construction. The true construction I apprehend is this—that you substitute for the words in the by-laws "arising out of transactions connected with the trade," the words in the agreement, "arising in connection with this agreement." That appears to me to be the obvious interpretation of the two documents.

Now, it is impossible to say that an action for wrongful dismissal is not a "dispute," or does not involve a dispute arising in connection with the agreement for service. Then we have in the 17th clause of the by-laws the provision that neither contracting party shall bring any action against the other in respect of any dispute until such dispute has been settled by the arbitrators, so as to bring the case within *Scott* v. *Avery*. (1) There is no reason at all that I can discover for refusing to stay this action under s. 4 of the Arbitration Act, 1889. I am satisfied that Phillimore J. came to the conclusion he did by reason of the decision in *Davis* v. *Starr* (2), which I have endeavoured to explain. Whether his attention was called to *Renshaw* v. *Queen Anne Mansions Co.* (3) I do not know. However, I think the appeal must be allowed with costs, and the order of Phillimore J. will therefore be discharged.

ROMER L.J. I agree. I think the questions in dispute in this action do come within the scope of the arbitration clause in the agreement of December 20, 1897. I further think that the questions in dispute ought to be referred, and that the defendants have done nothing in this case which would prevent them from insisting before us on the arbitration clause being applied. The case of *Davis* v. *Starr* (2) was clearly decided on the principle that the defendant there had himself, in some material respects, refused to be bound by the arbitration clause: he was not ready and willing to arbitrate. Whether that

(1) 5 H. L. C. 811. (2) 41 Ch. D. 242.
(3) [1897] 1 Q. B. 662.

principle was rightly applied in that case it is not for me to say, but the case was distinguished, and in my opinion rightly distinguished, in the case of *Renshaw* v. *Queen Anne Mansions Co.* (1), which I think substantially governs the case before us.

I should like to add this: if a master dismisses his servant under the terms of an agreement which contains a proper arbitration clause, you cannot say that there is any subject for arbitration on the question whether, after the dismissal, the servant can be regarded as still in the service of the master. There is nothing to arbitrate about in that: it cannot be a subject of arbitration at all. Even if the dismissal were wrong, the master cannot be compelled to employ the servant; so that after dismissal there remains nothing to be arbitrated about, except whether the dismissal was or was not wrongful, and if wrongful, then as to amount of damage. Nor can the fact of a dismissal by a master of a servant under such an agreement amount, in my opinion, in itself to a refusal by the master to arbitrate so as to prevent him from insisting upon the arbitration clause.

Appeal allowed.

Solicitors: *Rodway, Barrell & Wilkinson, Liverpool; Burn & Berridge, for Wilson, Dean & McMaster, Liverpool.*

(1) [1897] 1 Q. B. 662.

G. I. F. C.

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Dec. 6, 21.

BROWN *v.* PETO.

Mortgage—Lease by Mortgagor in Possession—Mansion-house, Furniture, and Sporting Rights—Foreclosure—Lease binding on Mortgagee—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.

A mortgagor of land while in possession leased for fourteen years the mortgaged mansion-house, together with the furniture and with sporting rights over the whole of the mortgaged land. The mortgagees having foreclosed:—

Held, that the lease was valid as against the mortgagees under s. 18 of the Conveyancing Act, 1881.

Action tried before Bigham J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge.

"This is an action to recover possession of a house and premises known as Knowlton Court, and for a declaration that the defendant never had and has not any right of shooting or sporting over the estate known as the Knowlton estate, and for mesne profits.

The plaintiff brings his action for possession on the grounds that the defendant was a yearly tenant to the plaintiff of Knowlton Court, and that the tenancy was duly determined by notice before writ, and he brings his action for the declaration as to the sporting rights on the ground that the defendant claims without title to exercise such right.

The defence is that the house and the sporting rights are both held by the defendant under a lease for fourteen years granted by one Lewis D'Aeth, and dated November 26, 1890, by which lease it is alleged the plaintiff is bound.

The question is whether that lease is binding on the plaintiff.

The facts were not in dispute, except so far as they related to certain circumstances which were said by the defendant to evidence a confirmation by the plaintiff or his predecessor of the lease in question, or to constitute an estoppel by acquiescence.

Knowlton Court and the Knowlton estate were in the year 1887 in mortgage to the plaintiff's predecessors in title to secure a sum of 30,000*l.*, Mr. Lewis D'Aeth, the beneficial owner, being then in possession. In the beginning of the year

1890 an agreement for a lease was entered into between Mr. D'Aeth and the defendant for the letting of the house and the grounds immediately around it, as well as of the sporting over the whole estate of about 1900 acres. At the end of 1890 Mr. D'Aeth wrote to the mortgagee's solicitors asking for a further loan of 2500*l.* In his letter he stated that "since the loan of 30,000*l.* was made the Court and about sixty-five acres and shooting over the estate have been let to Mr. Peto for 383*l.*" The answer to this letter was dated November 10, 1890, and it contained the following sentence: "We observe that the Court and the shooting are now let, but we should be glad to receive particulars of the property shewing all the present rentals." The lease was executed by D'Aeth and the defendant Peto on November 25, 1890. The particulars asked for on November 10, 1890, were sent to the mortgagees' solicitors in a letter dated December 12, 1890, and the first item is as follows: "Knowlton Court, &c., and shooting over the whole estate, fourteen years' lease from March 25, 1890," and the tenant's name and the rent were set out, together with a statement that the tenant was permitted to deduct 200*l.* a year from the rent until 748*l.* 5*s.* 10*d.*, part of his expenditure on the premises, had been repaid. The letter inclosing these particulars contained the following further information: "Mr. Peto has spent a large sum of money on the mansion in addition to the 748*l.* 5*s.* 10*d.* which has already been partly paid by deduction from Mr. Peto's rent." On receipt of this letter the mortgagees instructed their surveyor to revalue the estate, and in doing so they pointed out to him that the mansion and the shooting were let.

The surveyor made his report on January 28, 1891. In it he stated that the mansion-house had been put into a thorough state of repair at a cost of about 1000*l.*, and that it had been let with the shooting to Mr. Peto, a tenant of means, on a fourteen years' lease, and that in his opinion the security was such as to justify the further advance being made. The mortgagees (who were trustees) then applied to Stirling J. for leave to make a further advance, vouching the lease as evidence of the improved value of the property. Leave was granted to make an advance of 2500*l.*, and accordingly that sum was lent

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on the security of a further charge dated April 9, 1891. In October, 1893, Mr. D'Aeth attempted to obtain more money from the mortgagees, and in these negotiations, which came to nothing, the lease to Peto was produced to the mortgagees, and they then became aware of the terms and covenants contained in it. (See the answer to the first interrogatory, in which Mr. Dorman states, "The terms and covenants contained in the lease were not known to my firm until October, 1893, when the lease was produced to my firm on behalf of Captain D'Aeth.")

The payment of the interest having fallen into arrear, Mr. Kingsford, of Canterbury, a solicitor, was on May 30, 1894, appointed by all parties receiver of the rents and profits of the estate from the tenants thereof, the rents being specified in the receivership deed, and including, amongst others, the rent from Peto. By 1896 the arrears of interest amounted to 900*l.* or thereabouts, and, as the mortgagees were threatening to foreclose, Mr. D'Aeth agreed to sell to them the furniture in the mansion-house, but, as the use of this furniture had been let to Peto under his lease, the sale could only be made subject to Peto's interest in the chattels. The sale was carried out by a deed dated March 31, 1896. By this deed the mortgagees bought of D'Aeth the furniture, but "subject to and *with the benefit of* a lease thereof with Knowlton Court granted to W. H. Peto by an indenture dated November 26, 1890, under or by virtue of which he is now in possession of the same." Having so bought the furniture, the mortgagees set off the price against the arrears of interest due under their mortgage, and pro tanto got payment of the same. In order to affect Peto with notice, they served upon him, on April 16, 1896, a notice to the effect that they had bought the furniture, but subject to and with the benefit of his (Peto's) lease. On May 1, 1896, Mr. Kingsford was appointed manager of the estate, with power to grant leases for terms not exceeding twenty-one years, and on September 23, 1896, foreclosure proceedings were commenced.

While these proceedings were pending the question as to whether Mr. Peto's lease should be adopted by the mortgagees was discussed at an interview between the mortgagees' solicitor and Mr. Peto on October 30, 1896, but no decision was come to.

On November 11, 1896, the order for foreclosure was made. On December 19, 1896, Mr. Peto's solicitor wrote to the mortgagees' solicitor stating that Mr. Peto intended to stand by his lease. While matters were in this position Mr. Kingsford wrote to the defendant the letter of January 15, 1897, which is as follows: "Since you settled with me for the rent due for the mansion in September last a foreclosure order has been made by the Court of Chancery, and dated November 11 last, by which the absolute ownership in the Knowlton estate is now vested in the trustees of Major R. H. Brown, of Callaby Castle, Whittingham, Northumberland. . . . I am now directed by the present owners of the estate to collect the rents, and I shall, therefore, be obliged by your remitting me the quarter's rent due 25th ultimo at your early convenience."

Major Brown was the immediate predecessor in title of the present plaintiff.

Mr. Peto sent the cheque for the rent to Mr. Kingsford on January 16, and in the letter he inclosed three bills (amounting to 2*l.* 10*s.* 6*d.*) for damage done to the interior of the house by reason of the exterior falling into disrepair. Such damage was by the terms of Mr. Peto's lease to be made good by his landlord. On January 20, 1897, Mr. Kingsford gave a receipt for the rent in the following terms:—

"Knowlton Estate.

"20 January, 1897.

"Received of W. H. Peto, Esq., the sum of ninety-five pounds, twelve shillings, being a quarter's rent due 25 Dec. 1896, to the trustees of Major Brown, of Callaby Castle, Whittingham, Northumberland.

			£	*s.*	*d.*
For mansion-house, land, and shooting			95	17	6
For cottage			1	6	0
	s.	*d.*	97	3	6
Less quarterly allowance for fire insurance ..	12	6			
„ „ churchyard ..	19	0			
			1	11	6
			£95	12	0

"M. Kingsford, Receiver."

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And on February 6, 1897, Mr. Kingsford wrote to the defendant, saying: "I yesterday had an interview with Mr. Dorman on the subject of the future management of the Knowlton estate, and I received instructions from him on behalf of the present owners to do such reasonable repairs as you might require and I may consider the landlord liable for." He added a postscript to his letter as follows: "I inclose cheque for 2*l.* 10*s.* 6*d.* mentioned in yours of 16th ult. for wall papers." On February 8, 1897, Mr. Dorman (Mr. Kingsford's partner) wrote to the defendant saying that he had discussed the subject of repairs with Major Brown, and that he (Mr. Dorman) was of opinion that all his clients were liable for was outside repairs, or any inside repairs rendered necessary through the outside not being in a proper state; to which letter the defendant wrote in answer, on February 11, 1897, as follows:—

"Knowlton Court,
"Dover.
"11. 2. 97.

"Dear Sir,—Yours of the 8th inst. to hand.

"I am not able to agree with the construction which you place on the repairing covenants of my lease. One of the reasons which induced me to agree to pay so high a rent for the house was that the repairs specified in the lease should be done for me, and it would not be just to ask me to undertake them at my own expense unless a reduction from rent were agreed to on that account.

"Yours faithfully,
"W. H. Peto.

"C. Dorman, Esq."

No reply seems to have been sent to this letter. After this date the rent seems to have been paid quarterly to Mr. Kingsford, upon receipts in a form similar to that already set forth. At the beginning of 1898 a dispute arose between Mr. Dorman and the defendant as to keeping down the rabbits on the estate. This dispute terminated with a letter from Mr. Dorman to the defendant of February 21, 1898, in which he stated that the defendant was only a yearly tenant,

and in which was inclosed a notice to quit drawn on that footing."

Dickens, Q.C., and *Morton Smith*, for the plaintiff. The defendant is only a yearly tenant on the terms of the lease, and his tenancy was, therefore, determined by the notice to quit. The lease granted by D'Aeth, the mortgagor, did not come within the provisions of s. 18 of the Conveyancing Act, 1881, and is, therefore, not valid as against the mortgagee. That section authorizes the mortgagor in possession to make an agricultural or occupation lease of land. This was a lease of a house, furniture, and sporting rights, which was not contemplated by the section: *Dayrell* v. *Hoare*. (1) The furniture and the sporting rights were not included in the mortgage, although the house was so included. As one rent is reserved by the lease in respect of all the property demised, it is impossible to apportion it between the mortgaged and the unmortgaged property: *Tolson* v. *Sheard*. (2) A power to lease part of the land does not give a right to confer sporting rights over the remainder: *Duchess (Dowager) of Sutherland* v. *Duke of Sutherland*. (3) Sporting rights are not capable of occupation, and there can, therefore, be no occupation lease of them: *Reg.* v. *Wood*. (4)

Bray, Q.C., and *J. R. Atkin*, for the defendant. The lease was a good lease under s. 18 of the Conveyancing Act, and, therefore, binds the plaintiff. "Land" is defined by s. 2, sub-s. ii., of that Act to include hereditaments incorporeal and houses and other buildings. That would cover the lease of a furnished house and of sporting rights. Where a house is let furnished, the rent arises out of the realty and not out of the furniture: *Read* v. *Lawnse* (5); *Farewell* v. *Dickenson*. (6) As to the sporting rights, a lease by a mortgagor in possession under s. 18 binds the mortgagee in respect of easements granted with the land: *Wilson* v. *Queen's Club*. (7) But even

(1) (1840) 12 Ad. & E. 356.
(2) (1877) 5 Ch. D. 19.
(3) [1893] 3 Ch. 169.
(4) (1859) 1 F. & F. 470.
(5) (1561) 2 Dyer, 212 b.
(6) (1827) 6 B. & C. 251.
(7) [1891] 3 Ch. 522.

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if the lease is not valid under s. 18, its defects can be cured by 12 & 13 Vict. c. 26, s. 2.

The plaintiff cannot now set up the invalidity of the lease, since he has recognised and adopted it by his conduct.

Dickens, Q.C., replied.

Cur. adv. vult.

Dec. 21. BIGHAM J., after setting out the facts as above, read the following judgment:—The first question in the case is whether the lease of November 26, 1890, comes within the meaning of s. 18 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), so as to make it a good lease as against the mortgagees, although they were not parties to it. Before that Act, a lease made by a mortgagor alone did not bind the mortgagee, but it bound both the mortgagor and the tenant, by estoppel; it was a good lease as between the parties to it, but it did not affect the mortgagee. This rule of law produced hardship, particularly in cases where the mortgagor had been left in possession and the tenant had taken a lease without notice of the existence of the mortgage. To remove this hardship, and to enable persons in possession of land to deal with it more freely, the Act in question was passed. By s. 18, "A mortgagor of land while in possession shall, as against every incumbrancer, have by virtue of this Act power to make from time to time any such lease of the mortgaged land or any part thereof, as is in this section described and authorized. . . . The leases which the section authorizes are (i.) an agricultural or occupation lease for any term not exceeding twenty-one years, and (ii.) a building lease for any term not exceeding ninety-nine years." It is said on the part of the plaintiff in the present case that the lease on which the defendant relies does not come within the meaning of this section, firstly, because it is not "a lease of the mortgaged land, or any part thereof," and, secondly, because it is not "an occupation lease." Now the lease, leaving out immaterial words, reads as follows: "In consideration of the rent and covenants by the lessee hereinafter contained, the lessor doth hereby demise unto the lessee, first, all that capital messuage or mansion-house, with the stables, coach-

houses, and other out-buildings, gardens, pleasure-grounds, and orchard . . . . commonly called or known by the name of Knowlton Court, together also with such furniture and fixtures and other effects in or about the said mansion-house as are specified in the schedule hereunder, and the right of shooting and sporting over about 1900 acres" in certain parishes therein specified. "Secondly, all that part of Knowlton Park situate opposite the mansion-house, and containing forty-five acres, or thereabouts; and, thirdly, all that piece or parcel of meadow-land called or known of by the name Dog Kennel Pasture, in the parish of Knowlton aforesaid, containing eight acres and five perches, or thereabouts." The rent is then reserved as follows: "Yielding and paying, therefore, during the said term, the rents following: that is to say, in respect of the premises firstly hereby demised the clear yearly rent of 315*l.* 10*s.*, and in respect of the premises secondly and thirdly demised the clear yearly rent of 55*l.*"

Thus, the house and furniture and sporting rights are let for one lump sum of 315*l.* 10*s.*, the other properties being let for 55*l.* There is a covenant by the tenant to spend 746*l.* 18*s.* 6*d.* upon the property in internal repairs, which sum he was to be allowed to deduct from the rent at the rate of 50*l.* each quarter. The tenant also covenanted to keep the interior and also the furniture in good repair, and it was provided that the tenant should not be entitled to require the lessor to do any internal repairs unless the same should be rendered necessary by the neglect of the lessor to keep the outside in repair. The lessor covenanted to do the outside repairs. There were provisoes for the termination of the lease in certain events, and also for re-entry in case of breach of the lessee's covenants. It is said that this is not a lease of the mortgaged land, because it comprises a lease of the furniture, the two together being let at one rent; it is said that it is a lease of chattels as well as of land, and that therefore it is not within the section. I was referred to the case of *Tolson* v. *Sheard* (1) in support of this argument. That case merely decided that the trustees of two different trust estates, the properties of which happened to

(1) 5 Ch. D. 19.

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adjoin, could not grant a lease of both properties at one rent; it was said, and no doubt rightly, that such a lease would constitute a breach of trust. That was the only point decided. I do not think that the case is of any value for the purpose of interpreting the meaning of s. 18 of the Act of 1881. There is no doubt in my mind that this lease is a lease of part of the land mortgaged. It is none the less such a lease because it comprises in addition certain chattels; nor were the mortgagees in any way injured by the addition, for, in my opinion, the whole rent must be taken as issuing out of the land, and as being therefore recoverable by the mortgagees when they come to take possession: see *Read* v. *Lawnse* (1) and *Farewell* v. *Dickenson*. (2) Then it is said that this lease is not good because it comprises the right to shoot over a part of the land in mortgage which is not included in the demise. This raises a more difficult question. It was held in the case of *Dayrell* v. *Hoare* (3) that a power to lease several estates, hereditaments, and premises, or any part or parts thereof, did not authorize a lease of part of the lands with a right of shooting over the rest. It was said that if part is demised it must be demised in its entirety, and that it was outside the power to subject the land not demised to a servitude. But what kind of a lease does this Act of Parliament authorize? It is "any such lease of the mortgaged land or any part thereof as is in this section described and authorized." Three kinds of leases are described and authorized, namely, an agricultural lease, an occupation lease, and a building lease. These expressions are not defined, but I believe it is a common practice for the landlord to reserve the sporting rights when granting an agricultural lease; a lease with such a reservation would I think be an agricultural lease within the meaning of the Act. If after the making of such a lease the mortgagee in possession were to grant an occupation lease of the mansion with those reserved sporting rights, would such occupation lease be outside the power granted by the Act? For my part, I think not. If it would be outside the power, then the only way of letting the sporting rights would be by

(1) 2 Dyer, 212 b. (2) 6 B. & C. 251.
(3) 12 Ad. & E. 356.

some deed in which both mortgagor and mortgagee would have to join. It must be remembered that "land" is defined in the Act (see s. 2, sub-s. ii.) to include "tenements and hereditaments corporeal or incorporeal," and that it is any part of land so described that the mortgagor has power to lease. On this part of the case I was referred to the judgment of Romer J. in the *Duchess (Dowager) of Sutherland* v. *Duke of Sutherland*. (1) That case does not, however, appear to me to be of any importance in this connection. It was decided with reference to the supposed exercise of powers under the Settled Land Acts of 1882 and 1890, the provisions of which are quite different from those in the Act which I am now considering.

But then it was further said that that was not an "occupation lease" within the meaning of s. 18, because sporting rights could not be the subject of any occupation. I am not sure that sporting rights cannot be the subject of occupation; the owner of the sporting rights is rated as the "occupier" of them. But, however that may be, the fact (if it be a fact) that sporting rights cannot be the subject of occupation does not in my opinion render the lease any the less an occupation lease. I come, therefore, to the conclusion that the lease is within the meaning of the Act, and that it is, therefore, binding on the plaintiff. Assuming, however, that it is not, it was said for the defendant that the mistakes were such as could be cured with the assistance of the provisions of the 12 & 13 Vict. c. 26, s. 2. But I do not think it can be said that the inclusion of the furniture and the sporting rights amounted to a mistake or an inadvertence within the meaning of the preamble to that Act, and I am of opinion that to rectify this lease by severing the furniture or the sporting rights from the land, and by apportioning the rent between them, would be to make an entirely new lease, and not to rectify the already existing lease. It was further argued for the defendant that the lease was binding on the plaintiff because he had confirmed it, or had so acted as to estop him from now setting up that the defendant was merely a yearly tenant. The value of these contentions depends on the view to be taken of the facts. It is clear that before

(1) [1893] 3 Ch. 169.

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making the second advance the plaintiff's predecessors in title knew of the existence of the lease. It is also clear that they bought from D'Aeth the furniture, together with the benefit of the lease thereof, to the defendant, and that they gave notice of the fact to the defendant. They also received from the defendant the rent, and they paid to the defendant some small sums for repairs, which the defendant claimed to be entitled to under the terms of the lease; but in my opinion none of these things were done with the intention of creating a tenancy between them and the defendant for the whole term of the lease. The legal effect of the receipt of the rent was in my opinion to create a yearly tenancy on the conditions of the lease so far as they are applicable to such a tenancy. Neither the receipt of the rent nor any of the other circumstances would in my opinion justify me in holding that the parties had entered into any further contractual relations. I cannot discover any ground for saying that the plaintiff or his predecessors ever conducted themselves in such a way as now to estop them from asserting that the lease does not bind them. Finally, it was urged that, inasmuch as the second advance was made after the lease, and with full notice of it, and the foreclosure proceedings were in respect of both advances, the plaintiff was bound by the lease. I do not think, however, that these circumstances would be sufficient to deprive the plaintiff of the right which the mortgagees under the first mortgage had of objecting that the lease did not bind them.

I base my judgment upon the conclusion at which I have arrived that this lease was a lease within the meaning of the statute.

Judgment for the defendant.

Solicitors for plaintiff: *Kingsford, Dorman & Co.*

Solicitors for defendant: *Lee & Pembertons.*

A. P. P. K.

BOSTOCK *v.* RAMSEY URBAN DISTRICT COUNCIL.

1899
Dec. 14.

Practice — Costs — Action against Public Authority — Discretion to deprive Successful Defendants of Costs—Order LXV., *r.* 1—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

Where upon the trial of an action, brought aganist a person for an act or default in the execution of a statutory or other public duty, judgment is entered for the defendant, the discretionary power which is given to the judge by Order LXV., r. 1, to deprive the defendant of his costs is not taken away by s. 1 (*b*) of the Public Authorities Protection Act, 1893, which provides that, "Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

FURTHER CONSIDERATION before Lord Russell of Killowen C.J. after a trial with a jury.

The plaintiff was the part proprietor of a travelling menagerie. In December, 1897, a servant of the plaintiff, who was in charge of the menagerie, placed the vans of which it consisted, being some twenty or thirty in number, upon a certain public street in the town of Ramsey called the Great Whyte, thereby causing an obstruction to the highway. The man in charge of the menagerie was informed by the surveyor of highways that he could not be permitted to stand his vans on the street; but no measures were taken to have the obstruction removed by the police, and the vans remained blocking the street for the space of fifteen hours. In May, 1898, the defendants preferred an indictment against the plaintiff at the Huntingdon Assizes for having so unlawfully obstructed the highway. The plaintiff was acquitted of the charge, and thereupon brought this action against the defendants for malicious prosecution. The action was tried before the Lord Chief Justice and a special jury. The judge ruled that there was reasonable and probable cause for the prosecution, and that there was no evidence of malice. He accordingly directed judgment to be entered for the defendants. But, being of opinion that the course adopted by the defendants in

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proceeding by indictment, instead of causing the obstruction to be removed by the police at the time, was an unreasonable course, he ordered judgment to be entered without costs, reserving for further consideration the question whether, having regard to the provisions of the Public Authorities Protection Act, 1893 (1), he had the power to deprive the defendants of their costs.

Blake Odgers, Q.C., and *P. Rose-Innes*, for the plaintiff. The discretion which is given to the judge by Order LXV., r. 1, to deprive the successful party of his costs is not affected by s. 1 (*b*) of the Public Authorities Protection Act, 1893. In the corresponding section of the Public Health Act, 1848 (s. 139), it was provided that every action brought for anything done under the Act "shall be laid and tried in the county or place where the cause of action occurred and not elsewhere"; and it was held in *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton* (2) that that section did not take away the power of the Court to direct a change of venue where the ends of justice required it. The provision in s. 1 (*b*) of the Act of 1893 is merely a rule of construction: it means nothing more than this, that if a judgment is given for the defendant simpliciter, and nothing is said in the judgment about costs or the scale on which they are to be taxed, then the judgment is to be read as carrying costs to be taxed as between solicitor and client. This is the explanation of the decisions of Romer J. in *Harrop* v. *Ossett Corporation* (3) and *North Metropolitan Tramways Co.* v. *London County Council.* (4) In the corresponding section of the Public Health Act, 1875, s. 264, it was

(1) By the Public Authorities Protection Act, 1893, s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: . . . .

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

(2) (1858) 8 E. & B. 803, n.

(3) [1898] 1 Ch. 525.

(4) [1898] 2 Ch. 145.

provided that in an action against a local authority the defendants, if successful, should be entitled to "full costs of suit," which expression was held in *Avery* v. *Wood* (1) to mean costs as between party and party. The object of s. 1 (*b*) of the Act of 1893 was to reverse that decision. In the case of *Robinson* v. *Workington Corporation* (2), it appears from the shorthand notes of the judgment of Cave J. in the Court below that after a trial with a jury he entered judgment for the defendants without costs, assuming that he had the power now contended for, and the judgment was affirmed in the Court of Appeal, no objection being taken to the order as to costs. On the other hand, the case of *Cree* v. *St. Pancras Vestry* (3) is admittedly an authority against the present contention. There Bruce J. gave judgment for the defendants with costs as between solicitor and client. He said that as the defence was of a purely technical character he would have deprived the defendants of costs if he had a discretion in the matter, but he was of opinion that the Public Authorities Protection Act had taken his discretion away. The point, however, does not appear to have been discussed in argument.

Lawson Walton, Q.C., and *J. W. Cooper*, for the defendants. The judgment of Bruce J. in *Cree* v. *St. Pancras Vestry* (3), being a direct decision on the point, is binding on this Court. The decisions of Romer J. in *Harrop* v. *Ossett Corporation* (4) and *North Metropolitan Tramways Co.* v. *London County Council* (5), and that of Stirling J. in *Holford* v. *Acton Urban Council* (6), seem to be authorities that where judgment is given for the defendant the judge's discretion as to the scale of taxation is taken away. But if the Act is to be read as imperatively imposing a particular scale, why should it not be equally read as an imperative direction that a successful defendant shall have his costs?

LORD RUSSELL of KILLOWEN C.J. The main question raised in this case is undoubtedly one of general importance, and as

(1) [1891] 3 Ch. 115.
(2) [1897] 1 Q. B. 619.
(3) [1899] 1 Q. B. 693.
(4) [1898] 1 Ch. 525.
(5) [1898] 2 Ch. 145.
(6) [1898] 2 Ch. 240.

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to which it is desirable to have the authoritative opinion of the Court of Appeal. There is also a subordinate question whether, assuming that I had any discretion in the matter, there was under the circumstances of the case good cause to warrant me in depriving the defendants of their costs. I will deal with the latter question first. The prosecution which gave rise to this action was brought about in this way. The plaintiff was one of the proprietors of a travelling menagerie, which happened to visit the town of Ramsey. A representative of the plaintiff was proceeding to place the menagerie vans on a part of a public street in the town where in the opinion of the defendants they would cause an obstruction of the highway. Instead of taking what common sense would suggest was the most reasonable course to take under the circumstances, that of requiring the removal of the vans by the police—for there was no suggestion that the plaintiff's representative claimed any right to do what he did—the defendants preferred a solemn indictment against the plaintiff at the assizes. On the trial of that indictment the jury returned a verdict of not guilty. And thereupon the present action was brought against the defendants for having instituted the prosecution maliciously and without reasonable and probable cause. At the end of the case I arrived at the conclusion that there was no absence of reasonable and probable cause, because undoubtedly the vans were in a position in which they constituted an obstruction of the highway, and further that there was no evidence that the defendants had acted maliciously. I accordingly directed judgment to be entered for the defendants without costs. On the question whether these facts amounted to just cause for depriving the defendants of costs, the difficulty which has been suggested is this—that although the conduct of the defendants in preferring the indictment, instead of taking the simpler course which they ought to have taken, may have been unreasonable, yet, not being conduct in the course of the litigation, it was not such as ought to operate on the judge's mind when determining whether they should have their costs or not. But I am of opinion that the judge is not confined to the consideration of the defendants' conduct in the actual

litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. In the present case I think I am entitled to look at the antecedent conduct of the defendants which led to the apparent necessity of the plaintiff to vindicate himself against the charge which had been brought against him. If, therefore, I had the power to deprive the defendants of costs, I think that there was good cause for my so doing.

But the question remains whether I had the power. Order LXV., r. 1, of the Rules of 1883, which with a slight variation is in the same terms as the corresponding rule of 1875, provides that "subject to the provisions of the Acts and these Rules the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or judge," with the proviso that "where any action, cause, matter, or issue is tried with a jury the costs shall follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order." And the question is whether the discretion which is given to the judge by that rule is taken away by the Public Authorities Protection Act, 1893. The legislation which has from time to time been passed for the protection of public authorities dates back for a considerable period. Amongst the enactments passed for that purpose was a section of the Public Health Act, 1848, and the language of that section has been the subject of a decision which helps to throw some light upon the question with which I have now to deal. Sect. 139 of that Act, amongst a variety of provisions as to notice of action, limitation of action, pleading the general issue, &c., contained a provision as to venue. It provided that every action brought against a local board or other person for anything done under that Act "shall be laid and tried in the county or place where the cause of action arose and not elsewhere." Now, the construction of that branch of s. 139 came to be considered as far back as 1858 in the case of *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton* (1), and the Court of Queen's Bench came to the

(1) 8 E. & B. 803, p.

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conclusion that, emphatic as the words were, they had not the effect of taking away the discretion of the Court to change the venue where convenience and the ends of justice required that it should be changed. That decision has now lasted for upwards of forty years without, so far as I am aware, ever having been questioned. And I cannot help thinking that it may be regarded as a guide to the proper judicial interpretation to be put upon language which, though no doubt applied to a different subject, is of a similar character and is found in the corresponding provisions of the Act now in force for the protection of public authorities. The section upon which the defendants rely, s. 1 of the Public Authorities Protection Act, 1893, enacts that, where any action is brought against any person for any act or default in the execution of any statutory or other public duty, the following provisions shall have effect: "(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." It is to be observed that this language is not so imperative in its tone as that of s. 139 of the Act of 1848 to which I have referred, and with respect to which the Court held that it did not take away the discretion of the Court. It seems to me that the principle of that decision is equally applicable to the construction of the section now before me. It no doubt is reasonable that when a public authority successfully defends an action, and is not in any way to blame for the litigation in which it has been involved, it should be indemnified for the expense to which it has been put by getting its costs as between solicitor and client, and not merely as between party and party. But where the public authority has brought the litigation upon itself by its own unreasonable course of conduct, I cannot see any reason why the discretion of the Court to deprive it of costs should not be exercisable just as much as in the case of a private individual.

How, then, does the matter stand as regards authority? I do not propose to go into a minute examination of the cases that have been cited, but will content myself with saying that, while there are unquestionably expressions in one or two of the judgments which seem to suggest that there is some fetter upon the

discretion of the Court, there is, with one exception, no actual decision that the discretion has been taken away. The one decision to which I refer, that of Bruce J. in *Cree* v. *St. Pancras Vestry* (1), is no doubt a distinct authority in favour of the defendants' contention, and a stronger case could hardly be cited of the unreasonableness of this legislation if that contention is correct. The judge there said: "As the defence is of a purely technical character, I should, if I had a discretion in the matter, give judgment for the defendants without costs. But the Public Authorities Protection Act, 1893, s. 1 (*b*), takes away my discretion respecting costs, and I am compelled to give the defendants the costs of the action to be taxed as between solicitor and client. . . . I have only to say in conclusion that the case seems a strong commentary on the rules laid down by modern statute law. The defendants, a sanitary authority, have by their own default created a nuisance in their own district; by an unlawful exercise of their authority they induced a person, who was not liable, to expend 70*l.* in doing what the defendants themselves ought to have done; when the plaintiffs seek to recover from the defendants the 70*l.* so expended, the defendants raise, and succeed upon, the technical defence of a six months' statute of limitation, and this defence is considered by the Legislature so meritorious that the defendants are by statute declared to be entitled to costs as between solicitor and client, although it is open to grave doubt whether, apart from this special enactment conferring this privilege upon a defendant who succeeds on a technical defence, the judge, even in a meritorious case, at common law would have any jurisdiction to order costs to be taxed as between solicitor and client." There could not be a stronger condemnation of the uses to which this enactment, if it means what Bruce J. thinks, may be put, and of the injustice and wrong that may result from that construction. Am I, then, bound by that decision? I need not say that if it were a decision of long standing, and one which had long been acquiesced in, I should feel that I ought to conform to it. But it is neither, and, indeed, I do not find from the report of the case that the question of the construction of

(1) [1899] 1 Q. B. 693.

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the Act of 1893 was discussed at all in argument. Under those circumstances I do not feel bound to follow it. In my opinion, it is not a straining of the language of the statute to construe it as meaning nothing more than this—that wherever a judgment is entered for the defendants, without anything being said as to costs, the defendants are entitled to costs as between solicitor and client—that is to say, it leaves untouched the salutary discretion of the judge to deprive the defendants of costs in a proper case. I may add, although it is not necessary for me to decide the point, that I am by no means clear that, even where the judge intends the defendants to get costs, he has not equally a discretion to say where there is "good cause" that they shall be taxed as between party and party and not as between solicitor and client. I am not sure that the discretion given by Order LXV. does not apply to both the question whether the defendants shall get any costs at all, and also to the question, where they get them, of the scale upon which the costs shall be taxed.

In the result, then, I adhere to the order which I made at the trial, and the judgment will stand for the defendants without costs.

Judgment for defendants without costs.

Solicitor for plaintiff: *G. E. Lewis.*

Solicitors for defendants: *Stevens, Son & Parkes, for Serjeant & Son, Ramsey.*

J. F. C.

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD, APPELLANTS; ASSESSMENT COMMITTEE OF NEWPORT UNION, RESPONDENTS.

1900
Jan. 19.

Poor-rate — Rateability — Underground Sewers — Diminution of Value of Surface.

Where the surface of the soil through which an underground sewer runs was rateable before the sewer was constructed, the sewer is exempt from rating only if the surface is not diminished in value by reason of the construction. If the presence of the sewer restricts the uses to which the occupier of the surface can apply it, and thereby renders the surface of less value, the sewer, although underground, is rateable.

CASE stated by the quarter sessions for the county of Monmouth.

The appellants (1) are the governing body of a united drainage district consisting of part of the urban district of Ystradyfodwg and the urban district of Pontypridd, constituted by virtue of a provisional order of the Local Government Board, dated June 4, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purpose of carrying into effect a system of sewerage for the use of the said urban districts.

Pursuant to the powers vested in them by the said order, the appellants designed and constructed, and have since always maintained, a certain sewage carrier for the use of the said districts, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the districts to the sea. The total length of the sewage carrier is about 17¼ miles, whereof nearly 2½ miles passes through or over land situate in the parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was, previously to the construction of the sewage carrier, and still is, rated and assessed for the relief

(1) The terms "appellants" and "respondents" are used throughout this report to designate the parties who were respectively the appellants and respondents to the appeal before the quarter sessions.

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of the poor. The construction of the sewage carrier within the said parish is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground, 1021 yards of pipes laid below the surface and ordinary level of the ground, 1890 yards carried below the surface of the ground but covered by an artificial embankment of varying height which rises above the level of the adjacent land, and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connection with the outfall certain works have been erected by the appellants.

For the purpose of obtaining money for making and maintaining the sewage carrier and the necessary works appurtenant thereto, the appellants, in accordance with the provisions of the Public Health Act, 1875, borrowed the sum of 156,000*l.* from the Public Works Loan Commissioners, to be repaid with interest at the rate of 3½ per cent. per annum by equal annual payments extending over thirty years. The proportion of the annual repayment payable in respect of the portion of the sewage carrier situate in the parish of Rumney amounted to the sum of 1210*l.* This sum is raised by means of rates.

Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county, borough, or district to communicate with the sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had previously to the date of the making the assessment now appealed against been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, whereby the sewage of the districts under the control of the said local bodies was to be received in and carried away by the sewage carrier of the respondents upon payment to the appellants by the said local bodies of sums levied upon the respective rateable values of the said districts at the rate of 3¾*d.*, 4*d.*, and 3½*d.* in the pound per annum respectively. In consequence of receiving these sums from the

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three said local bodies, the appellants are enabled to raise sufficient money for the purpose of repaying the annual instalments of the money borrowed as aforesaid to make and maintain the sewage carrier and the works, machinery, and plant connected therewith in the parish of Rumney by two precepts at the rate of 2½*d.* in the pound in each year upon the Ystradyfodwg and Pontypridd areas. The rate in the pound in the last-mentioned area would have to be much increased in order to prevent the appellants incurring loss owing to their yearly expenditure in connection with the sewage carrier if the money received by the rates levied outside the said area as aforesaid, being money paid for the use of the sewage carrier, was not available for use by the appellants.

The appellants were assessed by the respondents in respect of that portion of the sewage carrier with the outfall and appurtenances thereof which is situate in the parish of Rumney in the sum of 800*l.* gross estimated value, and 700*l.* rateable value.

The appeal was heard and determined by the quarter sessions. It was proved before them that, as far as the parish of Rumney is concerned, the sewage carrier conveys the sewage from distant towns, places, or houses through the parish, and there is no connection to or with the sewage carrier from any lands, houses, or buildings in the parish. It was also proved that the embankment varied in height from eighteen inches to six feet above the ground through which it passed; that it was covered throughout by a mound of earth which was grazed over except where a footpath runs over the top of the mound and where manholes are placed; that it was not separated by any fence from the adjoining land, and that cattle had full access upon and across it throughout its entire length. It was also proved that the land upon which the embankment lies was previously to its formation assessed and rated to the relief of the poor, and that the said land remained so rated and assessed, no change having been made by reason of the making of the embankment in the rating and assessment.

Upon these facts the quarter sessions found that the portions of the sewage carrier which lay under the surface of the ground

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or in the embankment were not liable to be rated at all, but that the gross estimated value of the other portions of the sewage carrier in the parish of Rumney was 145*l.* (whereof 40*l.* was the gross estimated value of the outfall and works in connection therewith), and that the rateable value thereof was 105*l.*, and they accordingly allowed the appeal to this extent, subject to a case for the opinion of the Court. The respondents appealed.

Bosanquet, Q.C., and *Morton Brown*, for the respondents. The whole of the sewage carrier was rateable, including the portions which ran underground. Before the year 1893 there had been many decisions, of which *Reg.* v. *Metropolitan Board of Works* (1) is one, to the effect that sewers generally were not rateable, on the ground that they were supposed to be incapable of a beneficial occupation, and that sewage works could only be rated for what they would fetch for other purposes. But in that year the House of Lords in *West Ham* v. *London County Council* (2) exploded that doctrine, and laid it down that the question whether pecuniary profit can be derived from the occupation is not the test which determines whether the premises are rateable. They there drew a distinction between underground sewers and sewers running above ground. As regards the former, they recognised the non-rateability of such sewers in general, upon the ground that the construction of the sewer did not interfere with previous rateability, there having been no rateable subject-matter on the underground site occupied by the sewer, and the surface of the soil continuing rateable as before. As regards the latter, they refused to draw any distinction between sewers and any other erection upon the surface of land which was specially suitable for the purposes of the occupier, and held them rateable. Here the portions of the sewers which are underground do not satisfy the qualification above mentioned, that of not interfering with rateability of the surface. Here the sewage carrier runs close to the surface, so that the occupier of the surface would be prevented from ploughing it or building over it if so minded, or from

(1) (1868) L. R. 4 Q. B. 15. (2) [1893] A. C. 562.

using it for any other purpose than that of pasturage. And it is enough to make an underground sewer rateable that its presence renders the surface "of less value for occupation by other persons not requiring it for that special purpose" to which it is put by the existing occupier: see per Lord Herschell in *West Ham* v. *London County Council.* (1) Since the decision in the *West Ham Case* (2), it has been held in *Mayor, &c., of Leicester* v. *Beaumont Leys* (3), a case in which the facts were very similar to the present, that a sewer, although in part running underground, was rateable throughout its entire length.

Cripps, Q.C., Boyle, Q.C., and *Ram, Q.C.,* for the appellants. It is not disputed that the appellants are rateable in respect of so much of the sewage carrier as is above the surface of the ground. The claim of exemption is confined to the underground portions. And as to that portion the opinion of Lord Herschell in the *West Ham Case* (2) shews that it is not a subject of rating. In that case, indeed, the sewer in question was held rateable, but it was constructed above ground and covered as much as thirty-seven acres of the surface which were previously rateable, so that if the decision had been otherwise the rateable area of the district would have been to that extent diminished. Here, however, the case finds that the surface continues to be assessed at exactly the same value as before.

Bosanquet, Q.C., in reply.

CHANNELL J. In this case we have come to the conclusion that the decision of the quarter sessions was wrong. The subject is no doubt one of some difficulty, but the way is to a considerable extent cleared for us by the judgment of Lord Herschell in *West Ham* v. *London County Council.* (2) It appears quite clearly from that judgment that the exception of underground sewers from the general rule as to rateability is of a wholly anomalous character. The question we have to determine is whether the particular subject-matter of this appeal comes within that anomalous exception or not. Now, the

(1) [1893] A. C. 562, at p. 600. (2) [1893] A. C. 562.
(3) (1894) 63 L. J. (M.C.) 176.

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nature of that exception, so far as I can judge from the language of Lord Herschell, is this: where you find the surface rateable as it was before, and the fact that there is underground a thing which does not affect the rateability of the surface or the value or convenience of its occupation, then if that underground thing is used as a sewer it is not rateable. Therefore, what we have to consider is whether the presence of this sewage carrier, which in parts is underground in the sense that it is below the original surface, and in other parts underground only in the sense that the surface has now been raised so as to cover it, affects the value of the occupation of the surface. The facts which are found in the case are these: the surface is still occupied, and it is in fact rated at the same amount as that at which it was rated before the sewage carrier was constructed. It may be that this latter fact is to be accounted for by the supposition that the assessments have not been very carefully revised in this district. But we have not got a finding that the presence of the sewage carrier does not affect the occupation of the surface at all. Indeed, it seems to me that in the nature of things such a finding would be impossible, considering that it runs close to the surface and in places rises above the old surface level at varying heights, although no doubt it is grassed over and cattle can graze on it. I cannot doubt that if the occupiers of the surface were to come forward and complain that by reason of the sewage carrier running through their land their occupation was rendered less valuable, they would be entitled to have their rates reduced, though probably very slightly. I think we must assume that the surface has to some extent been interfered with, and upon that ground, even if there were no other, we should be bound to hold that the sewage carrier, although underground, is a rateable subject.

But further, this sewage carrier is one continuous construction, which in part of its course is carried on concrete arches. The part on concrete arches is so similar in character to the structure in *West Ham* v. *London County Council* (1), which was held by the House of Lords to be rateable, that the quarter

(1) [1893] A. C. 562.

sessions have felt unable to distinguish it, and have accordingly held that part to be rateable. That being so, I think that what was said by Collins J. in *Mayor, &c., of Leicester* v. *Beaumont Leys* (1) is applicable, namely, that "it is impossible to dissever a special part and to say that as to that part alone it is to be taken as an independent sewer." It seems to me that, this structure being above ground in some places and underground in others, it is not permissible to divide it into sections and say that in one man's field it is rateable, and in the next man's field it is not; and that taking the thing as a whole, we cannot say that it comes within the anomalous exception to which I have referred, but must hold that it is a subject which is liable to be rated. As to the amount at which it ought to be rated, no question arises before us.

BUCKNILL J. I agree, and for the same reasons.

Order of quarter sessions reversed.

Solicitors for appellants: *Wrentmore & Son, for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Warriner & Co., for Davis, Lloyds & Wilson, Newport, Mon.*

(1) 63 L. J. (M.C.) 176.

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Dec. 11, 12, 15.

In re SCOTT, DECEASED.

Revenue—Estate Duty—Devise to Issue of Testator—Death of Devisee in Lifetime of Testator—Issue of Devisee Living at Death of Testator—Devise taking Effect as if Devisee had survived Testator—Property passing on Death—Wills Act, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 33—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 1 (*l*), *sub-s.* 2 (*a*).

By the Wills Act, 1837, s. 33, "Where any person, being a child . . . . of the testator, to whom any real . . . . estate shall be devised . . . . for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise . . . . shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary estate to trustees. This devise included the property devised by the father's will, and took effect by virtue of the Wills Act, s. 33. On the death of the father estate duty was paid on all the property which passed on his death, including that devised to his son. The Commissioners of Inland Revenue claimed estate duty on the property devised by the son to the trustees.

On appeal by the trustees, under the Finance Act, 1894, s. 10, to determine the duty payable:—

Held, by Darling J., that the property was property of which the son was, at the time of his death, competent to dispose, and therefore was property passing on the death of the son, within the meaning of the Finance Act, 1894, s. 2, sub-s. 1 (*a*):

Held, by Channell J., that, as the Wills Act gave the property to the devisees of the son as if the son had survived the father, it gave it subject to the same duties as if the son had survived the father:

Held, by the Court, that estate duty was payable by the trustees.

APPEAL by Mary Jane Scott, the Rev. Alfred Scott, and Alfred Langton, trustees of the will of John Scott, junior, deceased, under the Finance Act, 1894, s. 10. The petition filed by the appellants contained the following statements:—

The petitioners are the trustees appointed by the will of John Scott, junior, deceased, and as trustees are persons aggrieved by the amount of duty claimed by the commissioners,

within the meaning of s. 10, sub-s. 1, of the Finance Act, 1894, and this petition is filed pursuant to rule 3 of the Rules of the Supreme Court made under s. 10 of the above Act.

On January 22, 1899, John Scott, junior, died, having by his will, dated May 4, 1896, appointed the petitioners to be executors and trustees of his will, and trustees for all the purposes of the Settled Land Acts, and devised and bequeathed to the petitioners all his residuary real and personal estate, according to the nature thereof, upon trust for conversion as thereinafter mentioned, the proceeds of conversion to be held in trust to pay an annuity of 200*l.* per annum to his only child Muriel Elsie Scott, during the joint lives of herself and her mother, commencing from the date of his death, and to pay the residue of the annual income to his wife, so long as she should remain his widow, she maintaining his daughter, and from and after her second marriage, subject to the said annuity, to pay the income, one half to his wife for her life, and the other half to his daughter, and from and after the death of his wife to hold the trust funds and the income thereof in trust for his daughter absolutely.

Probate of the will was, on March 10, 1899, granted to Mary Jane Scott, the widow and executrix of John Scott, junior (power being reserved to the other executors), and Mary Jane Scott, as executrix, upon application for probate delivered to the Commissioners of Inland Revenue an affidavit with schedules shewing the total net aggregate value of all property chargeable with estate duty which passed, or was deemed to have passed, at the death of John Scott, junior, within the meaning of the above-mentioned Act. This affidavit and schedules included all the real estate belonging to John Scott, junior, and shewed that the gross value thereof, as at the date of the deceased's death, was 13,000*l.*, and that the total net aggregate value of all property passing on the death of John Scott, junior, was 16,004*l.* 13*s.* 10*d.*

On May 12, 1899, John Scott, senior, the father of John Scott, junior, died, having by his will, dated June 5, 1891, devised all other his freehold premises in the City of London, not thereinbefore specifically devised, which should belong to

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him at his decease, unto and to the use of his son John Scott, junior, his heirs and assigns for ever. The value of the freehold premises in the City of London which belonged to John Scott, senior, at his decease, and had not been specifically devised in his will before the above-mentioned devise, has been assessed for the purposes of estate duty at 80,000*l.* On May 12, 1899, the date of the death of John Scott, senior, Muriel Elsie Scott, the only child of John Scott, junior, was still living, and by virtue of the premises, and s. 33 of the Wills Act, 1837 (1), the last-mentioned devise did not lapse, but took effect as if the death of John Scott, junior, had happened immediately after the death of the testator, John Scott, senior, by reason whereof the effect of the devise contained in the will of John Scott, senior, was, that on the death of John Scott, senior, the property in the freehold premises in the City of London, which belonged to John Scott, senior, at his decease, and were not in his will before specifically devised, passed from John Scott, senior, to the petitioners to hold upon the terms of the trust hereinbefore set out.

Probate of the will of John Scott, senior, with one codicil was granted to the Rev. Alfred Scott, Alfred Langton, and John Langton, the surviving executors named therein, on June 28, 1899, and estate duty in accordance with the terms of the Finance Act, 1894, has been calculated in respect of all the property which passed on the death of John Scott, senior, including the freehold premises in the City of London which belonged to John Scott, senior, at his decease, and has been duly paid.

On July 10, 1899, Mary Jane Scott, as executrix of the will of John Scott, junior, pursuant to s. 6 of the Finance Act,

(1) 7 Will. 4 and 1 Vict. c. 26. By s. 33, "Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

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1894, delivered an account of property chargeable with estate duty on the death of John Scott, junior, shewing that the real estate included in the above-mentioned affidavit with schedules delivered by her had been sold on June 12, 1899, for 15,000*l.*, and further shewing that the above-mentioned devise by John Scott, senior, was contained in his will, and that she was advised that it would take effect in the manner hereinbefore described, and that she was informed by the Inland Revenue Department that the property so devised would not fall to be aggregated with the property included in the said account, and accordingly the estate duty was calculated, pursuant to the Finance Act, 1894, on the said sum of 15,000*l.*, and with interest up to the date of payment amounted to 601*l.* 7*s.* 7*d.*, and the said sum was duly paid to the commissioners on July 10, 1899.

The freehold premises in the City of London, which belonged to John Scott, senior, at his decease, and were devised as above mentioned by his will, were property in which John Scott, junior, never had an interest.

The will of John Scott, senior, the will of John Scott, junior, and the statutes, 7 Will. 4 and 1 Vict. c. 26, s. 33, 45 & 46 Vict. c. 38, s. 2, and 57 & 58 Vict. c. 30, s. 22, sub-s. 1 (*i*), together constitute a settlement, within the meaning of the Finance Act, 1894, and on and after May 12, 1899, the freehold premises in the City of London, which had belonged to John Scott, senior, at his decease, and had been devised as above mentioned by his will, were settled property subject to the said settlement, and the only interest, if any, which John Scott, junior, had in the said property was the interest which he had under the settlement. Estate duty has, as above mentioned, been paid in respect of the settled property since the date of the settlement, and no person has died who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of the settled property.

The interest, if any, which John Scott, junior, had under the settlement failed or determined by reason of his death before it became an interest in possession, and subsequent limitations under the settlement, namely, the above-mentioned limitations

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in favour of the wife and daughter of John Scott, junior, continue to subsist.

On June 21, 1899, the Commissioners of Inland Revenue, by a letter of that date, intimated their opinion that a further estate duty was payable in respect of the property so devised by John Scott, senior, as being property which also passed on the death of John Scott, junior, but admitted that the said property did not fall to be aggregated with other property passing on the death of John Scott, junior, for the purpose of determining the rate of the estate duty payable in connection with the death of John Scott, junior; and on July 22, 1899, the Commissioners of Inland Revenue, by a letter dated July 21, 1899, formally notified to the solicitor for the petitioners their claim that a further estate duty was payable in respect of the property devised by John Scott, senior, as being property which also passed on the death of John Scott, junior, and a further claim that, as the property passed under the disposition of John Scott, junior, it was liable to aggregation with the general estate of John Scott, junior, under s. 4 of the Finance Act, 1894.

The petitioners, being aggrieved by the claims made by the commissioners, with a view to an appeal to the High Court, and pursuant to rule 1 of the Rules of the Supreme Court under s. 10 of the Finance Act, caused to be prepared and to be delivered to the commissioners on August 16, 1899, a written statement of the grounds of their appeal.

The petitioners are advised and will submit that, upon the grounds stated in the above-mentioned written statement delivered as aforesaid, the claims of the Commissioners of Inland Revenue are erroneous. The petitioners prayed:—

1. That it might be declared that the freehold premises in the City of London, which belonged to John Scott, senior, at his decease, and were devised by him as above mentioned, and passed to the petitioners on the death of John Scott, senior, were not property which passed on the death of John Scott, junior, within the meaning of the Finance Act, 1894.

2. Alternatively, if it should be decided that any property in the freehold premises in the City of London was property

which must be deemed to have passed on the death of John Scott, junior, within the meaning of s. 2 of the Finance Act, 1894, and was property passing on the death of John Scott, junior, within the terms of s. 1 or of s. 22, sub-s. 1 (*l*), that it might be declared that such property was settled on May 12, 1899, by the will of John Scott, senior, the will of John Scott, junior, and the statutes 7 Will. 4, and 1 Vict. c. 26, s. 33; 45 & 46 Vict. c. 38, s. 2; 57 & 58 Vict. c. 30, s. 22, sub-s. 1 (*i*), and that estate duty had already been paid in respect of it since May 12, 1899, and that no person had died, who was at the time of his death, or at any time during the continuance of the settlement, competent to dispose of the property, and that the estate duty was not, nor were any of the duties mentioned in the 5th paragraph of the 1st schedule to 57 & 58 Vict. c. 30, payable in respect thereof.

3. And, alternatively, if it should be decided that any property in the freehold premises in the City of London was property which must be deemed to have passed on the death of John Scott, junior, within the meaning of s. 2 of the Finance Act, 1894, or was property passing on the death of John Scott, junior, within the terms of s. 1 or of s. 22, sub-s. 1 (*l*), that it might be declared that such property was settled by the will of John Scott, senior, the will of John Scott, junior, and the statutes 7 Will. 4 and 1 Vict. c. 26, s. 33; 45 & 46 Vict. c. 38, s. 2, and 57 & 58 Vict. c. 30, s. 22, sub-s. 1 (*i*), and that the interest of John Scott, junior, under the settlement failed and determined, by reason of his death before it became an interest in possession, and that subsequent limitations under the settlement continued to subsist, and that the property was not to be deemed to pass on the death of John Scott, junior.

4. And, alternatively, if it should be decided that any property in the freehold premises in the City of London was property which passed on the death of John Scott, junior, within the meaning of the Finance Act, 1894, a declaration that such property was property in which John Scott, junior, never had an interest, and that for the purpose of determining the rate of the estate duty to be paid on any property passing on the death of John Scott, junior, such property ought not to

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be aggregated with any other property, but ought to be an estate by itself.

5. Or that such further or other order might be made as should be just. (1)

(1) The following provisions in the Settled Land Act, 1882, and the Finance Act, 1894, are material for the purpose of the decision :—

Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement."

Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this part of this Act" (expiration of August 1, 1894), "there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value, ascertained as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'estate duty,' at the graduated rates hereinafter mentioned. . . . ."

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include . . . .

"(*a*) Property of which the deceased was at the time of his death competent to dispose."

Sect. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing, in respect of which estate duty is leviable, shall be aggregated, so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

"Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property, but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of estate duty."

Sect. 10, sub-s. 1: "Any person aggrieved by the decision of the commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the commissioners, whether on the ground of the value of any property, or the rate charged, or otherwise, may on payment of, or giving security as hereinafter mentioned for, the duty claimed by the commissioners, or such portion of it as is then payable by him, appeal to the High Court, within the time, and in the manner, and on the conditions, directed by Rules of Court, and the amount of

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Dec. 11, 12. *Joseph Walton, Q.C.* (*Edwardes Jones* with him), for the petitioners. The property referred to in the case is not property which passed on the death of John Scott, junior, within the meaning of s. 1 of the Finance Act, 1894. The claim of the Crown is founded on a misreading of s. 33 of the Wills Act, 1837. To give effect to that claim it is necessary to suppose a fictitious death of John Scott, junior, not when he really did die, on January 22, 1899, but immediately after the date of the death of his father, John Scott, senior, on May 12, 1899. All that the Wills Act did was to provide that, in order to prevent a lapse, such a state of facts as occurred here was to be treated as if the son had died immediately after his father's death, for the purpose only of causing the property to pass by the will, but for no other purpose. John Scott, junior, was not competent to dispose of this property at the time of his death, January 22, 1899, within the meaning of s. 2, sub-s. 1 (*a*), of the Finance Act, for he had no interest in the property.

The Attorney-General (*Sir Richard Webster, Q.C.*) and *The Solicitor-General* (*Sir Robert Finlay, Q.C.*), (*Vaughan Hawkins* with them), for the Crown. The effect of s. 33 of the Wills

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duty shall be determined by the High Court, and if the duty as determined is less than that paid to the commissioners the excess shall be repaid."

Sect. 22, sub-s. 1: "In this part of this Act, unless the context otherwise requires:—

* * * * *

"(*i*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust:

* * * * *

"(*l*) The expression 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression 'on the death' includes 'at a period ascertainable only by reference to the death':

* * * * *

Sub-sect. 2: "For the purposes of this part of this Act—

"(*a*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property."

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Act is that the case must be treated as if John Scott, junior, had died immediately after his father, and it must be so treated for the purpose of determining what duty is payable. This was property which passed on the death of John Scott, junior, within the meaning of s. 1 of the Finance Act. It was property of which he was at the time of his death competent to dispose, within the meaning of s. 2, sub-s. 1 (*a*). This view as to the effect of the statutes is supported by s. 22, sub-s. 1 (*l*). The result of the statutes when taken together, and of the authorities, is that the petition fails, and estate duty is payable.

[The following authorities were referred to in the course of the argument: *Platt* v. *Routh* (1); *Johnson* v. *Johnson* (2); *Winter* v. *Winter* (3); *Attorney-General* v. *Brunning* (4); *In the Goods of Parker* (5); *Pearce* v. *Graham* (6); *Perry's Executors* v. *Reg.* (7); *Attorney-General* v. *Littledale* (8); *Lord Advocate* v. *Bogie* (9); *Attorney-General* v. *Loyd.* (10)]

Joseph Walton, Q.C., replied.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered:—

DARLING J. The question raised in this case is, whether the trustees under the will of John Scott, junior, deceased, are to pay estate duty under the Finance Act of 1894, in respect of certain real property which had been devised to John Scott, junior, by his father.

John Scott, junior, died on January 22, 1899, having made his will on May 4, 1896. This will was proved on March 10, 1899. By it he devised all his residuary real and personal estate to his trustees, in trust for his widow and daughter, who both survived him.

On May 12, 1899, nearly four months after the death of John

(1) (1840) 6 M. & W. 756.
(2) (1843) 3 Hare, 157, Wigram V.-C.
(3) (1846) 5 Hare, 306, Wigram V.-C.
(4) (1860) 8 H. L. C. 243.
(5) (1860) 1 Sw. & Tr. 523, Sir C. Cresswell.
(6) (1863) 9 Jur. (N.S.) 568, Kindersley V.-C.
(7) (1868) L. R. 4 Ex. 27.
(8) (1871) L. R. 5 H. L. 290.
(9) [1894] A. C. 83.
(10) [1895] 1 Q. B. 496.

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Scott, junior, his father died, leaving a will dated June 5, 1891. By this will was devised to John Scott, junior, his heirs and assigns, a certain freehold property in the City of London. This will was duly proved, and estate duty has been paid by the trustees of the will of John Scott, senior, in respect of all the property which passed on the death of John Scott, senior, including this estate devised to John Scott, junior.

John Scott, junior, never had an interest in the estate so devised to him, for he had died before his father; but it is claimed that the estate of John Scott, junior, is liable to estate duty in respect of the property so devised to him, by reason of the effect of the Finance Act, 1894, and the Wills Act, 1837.

It is provided by s. 33 of the Wills Act, 1837, "that where any person being a child . . . . of the testator, to whom any real . . . . estate shall be devised . . . . for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise . . . . shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Now here it is plain that the devise of the estate devised to John Scott, junior, by his father did not lapse, but enures to be disposed of according to the trusts of the son's will.

Hereupon arises the claim to further estate duty, and it is argued on behalf of the Crown that this estate is covered by the words of the Finance Act, 1894, because this was property which "passed on the death" of John Scott, junior, within the meaning of that statute, s. 1.

As a matter of fact this estate never was the property of John Scott, junior, although it would have become so had he in fact died immediately after the death of his father. For the Crown it is, however, contended that the natural death of John Scott, junior, should be disregarded for this purpose, and that a "constructive death" at a later date must be imagined, or in the words of the Solicitor-General, "the life of the son is projected forward, and his death postponed, by the Wills Act."

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In my opinion the Wills Act has no such operation, and this contention must go the way of that in *Pearce* v. *Graham* (1), where such a reading of the Wills Act was used to support the argument that coverture revived, so that a widow was reconstituted the wife of a man who had been dead some years. That contention, in itself sufficiently extravagant, might easily have led on to a doctrine of constructive bigamy, and the present suggested fiction of "life projected forward," or "death postponed," might, if accepted now, soon be coupled with another doctrine, too readily adopted by some—that of constructive murder—with consequences too absurd to be even alluded to here.

Many cases were cited to us as to the effect of s. 33 of the Wills Act. I make no doubt that they were rightly decided; but none the less I am unable to agree that all the language used in them is appropriate. Take, for example, the expression of Sir Cresswell Cresswell in *Parker's Case* (2), to the effect that s. 33 "renders the subject of the gift the absolute property of the predeceased devisee or legatee." That, to my mind, is impossible, for we do not carry anything out of this world.

I think the matter is properly put by Kindersley V.-C., where, in *Pearce* v. *Graham* (1), he says: "The Wills Act simply prolongs, by a fiction, the life of a legatee for a particular purpose, viz., to prevent a legacy given to a child dying before, but leaving issue which survived, the testator, from lapsing."

The policy of the Wills Act is moreover well explained, as it seems to me, by Wigram V.-C. in *Winter* v. *Winter*. (3)

For my own part, I believe that Act, having regard to parental affection, intended to recognise the truth expressed by Gray in his Elegy:—

> "E'en from the tomb the voice of nature cries;
> E'en in our ashes live their wonted fires,"

and I think it meant no more.

I cannot, therefore, hold that this was in fact property of the deceased, John Scott, junior, which passed on his death—

(1) 9 Jur. (N.S.) 568. (2) 1 Sw. & Tr. 523.
(3) 5 Hare, 306, at pp. 312, 313.

meaning a fictitious death occurring months after his burial—by virtue of s. 1 only of the Finance Act, 1894.

But I have much greater difficulty in dealing with the contention that, within s. 2, sub-s. 1, of that Act, it is liable to estate duty, as being property of which the deceased was at the time of his death competent to dispose. I do not feel that I derive any assistance in construing these words from the terms of the Finance Act, 1894, s. 22, sub-s. 2 (*a*); but it is to be observed that the Wills Act does not give the devised property to the issue of the devisee, although, failing such issue, the devise will lapse; and, further, a devise of the residue of his estate will enable the son who dies in his father's lifetime, leaving issue, to effectually dispose of what never would be his own, even—as *Winter* v. *Winter* (1) shews—of property left to him by a will made after his death. I come to the conclusion that this estate was property of which John Scott, junior, was "competent to dispose." It remains still to consider whether "at the time of his death" he was so competent. And here, for the reasons I have given already, I understand by the words "his death" his real, natural death, and not any decease by fiction of law.

Now what disposed of the property? Clearly it was the will of John Scott, junior. When? Well, four months after that will first came into operation; four months after the death of the maker of it. Yet that will had no force of its own. All that it could do was what its testator did, and what he did was to make the will. He made it before his death. It spoke with his last breath, and what he could not then say by means of it that will cannot say nor ever could. Still it had force to devise this estate. That is to say, he who made it was competent to do what it in law effected.

Therefore I think that the case comes within the Finance Act, 1894, s. 2; but I have arrived at this opinion after much doubt, and by a train of reasoning in which I am conscious that there may perhaps be some defect. Still I think this conclusion is the right one, for my brother Channell has arrived at the same end by another road.

(1) 5 Hare, 306, at pp. 312, 313.

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Estate duty must therefore be paid. How that duty shall be calculated remains yet to be determined. I am of opinion that this property is, by virtue of the Finance Act, 1894, ss. 5 and 22, sub-s. 1 (*i*), and s. 2 of the Settled Land Act, 1882, to be considered as settled property, and therefore is liable only to such duty as can be charged upon it having regard to those provisions. I understand that additional settlement duty is not in this case claimed.

CHANNELL J. The facts with which we have to deal in this case are these. John Scott, senior, being possessed of freehold premises of large value in the City of London, by his will devised them to his son John Scott, junior. John Scott, junior, had died in his father's lifetime, but, as there was a child of John Scott, junior, living at the death of John Scott, senior, the devise of those premises in the will of John Scott, senior, does not lapse, but, by virtue of s. 33 of the Wills Act, is "to take effect as if the death of" Scott, junior, "had happened immediately after the death of" Scott, senior, there being no contrary intention indicated by the will. That being so, estate duty, under the Finance Act, 1894, of course became payable in respect of the passing of the property on the death of Scott, senior. By the combined effect of the wills of Scott, senior, and Scott, junior, and of the Wills Act, the freehold premises are now undoubtedly the property of the petitioners, who are the devisees under the will of Scott, junior. The question we have to decide is, whether another sum for estate duty is payable by the petitioners, as upon the passing, or supposed passing, of the property on the death of Scott, junior.

During the argument of this case I certainly was of opinion that the question must be determined by ascertaining what was the true legal construction of the material provisions of the Finance Act. These provisions are extremely intricate, and when we came to apply them to the case before us it was very difficult to arrive at any clear conclusion as to their effect. I was, however, then, and I still am, unable to bring myself to the conclusion that the property really did pass on the death of Scott, junior, even under the definition of property passing given by

s. 22, sub-s. 1 (*l*), and certainly not without it. I think that is so, whether "passing on the death" means passing in point of time on the death, or "passing by reason of the death," as suggested by the Solicitor-General. It seems to me that after the death of Scott, junior, as before it, the freehold premises remained absolutely the property of Scott, senior. Nothing had happened either to pass the property in them or to interfere with Scott, senior's, absolute right to dispose of them as he pleased. The property neither passed on the death, in point of time, nor did it then, or ever, pass by reason of the death. It passed by reason of Scott, senior's, death, and of his disposition of the property.

The question whether Scott, junior, was competent to dispose of the property, within the meaning of s. 2, sub-s. 1 (*a*), is somewhat more difficult. It is said on the one hand that any man who dies leaving both a parent and a child living is made competent by the Wills Act to dispose of anything which the parent may happen afterwards, during the life of the grandchild, to leave to him by will. But, at most, the son only directs to whom the property shall go if his father chooses to adopt that mode of disposition, and it is really the father who disposes. Further, there is doubt whether to bring the case within s. 2, sub-s. 1 (*a*), there must not be power to dispose of the specific freehold houses in question, which is more difficult still to see. I have, however, come to the conclusion that this case does not turn so much upon the consideration of these clauses of the Finance Act as upon the question of the true construction of the Wills Act. What is the meaning of the devise "taking effect as if the son had died immediately after the father"?

Several cases on the construction of this section of the Wills Act were quoted to us on the argument, and some difficulty was occasioned by the fact that several of them report language to have been used by counsel, and by learned judges, which cannot be considered literally accurate. It may be, and I think is, the fact, that in none of the cases was the language used by the judges misleading in the particular cases, having regard to the facts of those cases; but when the expressions used by the

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judges are quoted, and it is sought to apply them to other cases, the language used becomes misleading. It is not the fact that the statute placed the son in the same position as if he had survived the father, nor is it literally true to say that the Wills Act "makes the subject of the gift the absolute property of the predeceased legatee or devisee," though it might be true to say that the Act directs that the subject of the gift should be dealt with as if it had been the absolute property of the deceased.

Kindersley V.-C., in *Pearce* v. *Graham* (1), states the effect of the statute correctly, when he says that the "Act simply prolongs the life of the legatee for a particular purpose—namely, to prevent a legacy given to a child, dying before, but leaving issue which survived, the testator, from lapsing, and does not prolong the life for any other purpose." But the Act does say just a little more. What the Act does say is, that the devise is not to lapse, but is to take effect, and the mode in which it is to take effect is, "as if the son had died after the father." Now, how is this to be carried out? If the son has died intestate his heir takes as he would if the son had in fact survived his father. If the son has made a will containing appropriate words, by residuary devise or otherwise, to carry the property, the devisees take. If the son has died insolvent, the creditors take; so far the matter is fairly clear, but what do they take in each case? and does the Crown also take anything? If the son had in fact survived the father, the beneficiaries of the son would have taken the property subject to the payment of duties to the Crown. The duties are a charge on the property. If those duties are not to be paid when the devisees get the property by virtue of the Wills Act, they will take more than if the son had survived the father. Is this making the devise take effect as if the son had survived the father? It seems to me that it is giving the devise a different effect, and the only way to give it the same effect is to hold that, as the Wills Act gives the property to the devisees of the son as if he had survived his father, it gives it, subject to the same duties, and also gives to the Crown the same duties, as if the son had survived the father.

(1) 9 Jur. (N.S.) 568.

I think this must be considered to have been held by the Court of Exchequer in *Executors of Perry* v. *Reg.* (1) That is one of the cases which contain some expressions not altogether accurate, as to the effect of the Wills Act, and various reasons are given by the judges, which are perhaps not quite consistent with each other, but the judgments of Kelly C.B. and of Channell B. appear based mainly on the ground I have stated. I think also that both the cases of *Lord Advocate* v. *Bogie* (2) and *Attorney-General* v. *Loyd* (3) accord with this view of *Perry's Case.* (1)

Mr. Joseph Walton, in his reply on behalf of the petitioners, contended that the effect of the Wills Act was to write into the will of Scott, senior, the words "and if my son dies in my lifetime, the said property shall devolve as if my son had died immediately after me." If that were so the case would be similar to *Bogie's Case* (2) and *Loyd's Case* (3), and, as Lord Watson points out in one case, and Wright J. in the other, the question would be one of ascertaining the intention of the testator. Did the testator intend by the words used to give the Crown the same duties as if the son had survived? In neither of the two cases did the judges find any indication of such an intention, nor would it be likely that such an intention would exist in fact. But Wright J. said, and I think Lord Watson probably meant, that the Wills Act stood on a different footing. Whether they, and the other judges taking part in *Bogie's Case* (2) and *Loyd's Case* (3), approved of *Perry's Case* (1) I do not know, but at any rate they did not say anything to shake its authority. Looking at *Perry's Case* (1) as turning merely on the construction of the Probate Duty Acts, though binding on us, it is not in point in this case, because the words of the Probate Duty Acts and of the Finance Acts are very different, but looking at it as putting a construction on the Wills Act, it is not only binding but in point. I think, upon my own view of the true construction of the Wills Act, and also upon the authority of *Perry's Case* (1), that we are bound to hold that s. 33 of the Wills Act gives to the Crown the same duties as if

(1) L. R. 4 Ex. 27. (2) [1894] A. C. 83.
(3) [1895] 1 Q. B. 496.

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the son had survived the father, and gives the property to the devisees of the son, subject to the payment of the same duties as if the son had survived. That being so, I do not think that there is any difficulty in holding that the machinery of the Finance Act applies to the assessment and recovery of the duty. Estate duty is, in my opinion, payable, and, of course, upon the view I have taken, the settlement question, which would have been one of some difficulty, does not arise. I think there was in fact a settlement, by the combined effect of the two wills and of the Wills Act, but I think that effect must be given to it as if the son had survived, that is to say, that it takes effect as a settlement made by the son. The duty out of this property must be the same as if the son had survived. The rate on the property, therefore, will be arrived at by taking the rate applicable to this property when aggregated with the other property of John Scott, junior. I do not know whether the Crown claims any additional duty, that is, at a higher rate than paid on the 16,000*l.*, property of John Scott, junior, by reason of the aggregation with it of this freehold property, but I do not think the Crown entitled to such a higher rate on the 16,000*l.* The Wills Act gives the duty on the property passing by virtue of it, but it is difficult to see how it could give a higher duty on other property. This case should be dealt with as coming under s. 7, sub-s. 6 (*a*) and (*b*), which provision happens to fit this case.

There must be judgment for the Crown.

Judgment for the Crown. Leave to appeal. (1)

Solicitors for petitioners: *Crawley, Arnold & Co.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

(1) Required by 57 & 58 Vict. c. 30, s. 10, sub-s. 2.

P. B. H.

BURTON *v.* ST. GILES' AND ST. GEORGE'S ASSESSMENT COMMITTEE.

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Jan. 11.

Poor-rate—Rateable Occupation—Hoardings—Advertising Contractor—Permitting Land to be used for the Exhibition of Advertisements—Advertising Stations (Rating) Act, 1889 (52 & 53 *Vict. c.* 27), *s.* 3.

The appellant, an advertising contractor, under an agreement with the builders of certain buildings then in course of erection, used the hoardings erected by them for the exhibition of advertisements. The appellant's name having been inserted in a valuation list as being the rateable occupier of the hoardings under s. 3 of the Advertising Stations (Rating) Act, 1889:—

Held, that he did not "permit" the "land" on which the hoardings were erected to be "used for the exhibition of advertisements" within the meaning of that section, and was not liable to be rated in respect thereof.

CASE stated by the quarter sessions for the county of London on an appeal against a valuation list.

1. The appellant is an advertising agent carrying on business under the name of Partington & Co. In order to carry on his business, which is that of displaying advertisements for persons desiring to advertise, the appellant obtains licences from, amongst others, builders and owners or lessees of land to affix during building operations advertisements on the exterior of the hoardings necessarily erected during the continuance of building operations. Having obtained such licences, the appellant affixes to the hoardings the advertisements which he has agreed with intending advertisers to exhibit.

2. The respondent committee are the authority invested by the Valuation (Metropolis) Act, 1869, and the Acts amending the same or incorporated therewith, with power to hear and decide objections to assessments of premises in the parish of St. George, Bloomsbury, in the county of London, made by the overseers of the said parish for the purpose of rates for the relief of the poor.

3. In a supplemental valuation list made for the said parish previously to June 1, 1898, the appellant was inserted by the

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overseers of the parish as being the rateable occupier of what is therein described as an "advertising station" situate at 72 to 86, Southampton Row, in the said parish, of an alleged gross value of 100*l.*, and an alleged rateable value of 95*l.*, and a "hoarding" situate at 100 to 112, Southampton Row, of an alleged gross value of 144*l.*, and an alleged rateable value of 137*l.*, and Nightingale & Co. were in the said list, inserted as the rateable occupiers of what is therein described as a "hoarding," situate at Hyde Street and Museum Street in the said parish, of an alleged gross value of 216*l.*, and an alleged rateable value of 166*l.*

4. On June 14, 1898, the appellant duly gave notice of objection to the said list. On June 23, 1898, the respondents heard the appellant's objections to the list and affirmed the assessments. The respondents also substituted in the said list the appellant as the rateable occupier of the hoarding situate at Hyde Street and Museum Street in lieu of Nightingale & Co.

5. On December 17, 1898, the appellant duly served notice of appeal from the said decisions of the respondents to the quarter sessions.

6. The said advertising station and hoardings consist of a framework of wooden beams, the basis of the uprights being fixed in the ground, and the whole being supported by wooden props or stays. To these frames planks are closely nailed so as to screen the building operations from the highway. On the face of the said screen, towards the highway, advertisements are affixed. The station and hoardings were erected upon the highway of Southampton Row, Hyde Street, and Museum Street, respectively adjoining land on which building operations were being carried on, the lessees of the lands being respectively bound by covenants with the lessors to erect and maintain a strong, close-boarded hoarding completely inclosing the part of the land demised by their respective leases, and were from time to time increased or diminished in height and length as the requirements of the building operations rendered necessary. The hoardings in Hyde Street and Museum Street, and 100 to 112, Southampton Row, were wholly erected by the builder engaged in constructing the buildings screened by the said

hoardings. The framework of the advertising station, 72 to 86, Southampton Row, and the supports thereto were erected by the builder of the buildings in course of erection on that site, but the boards forming the screen on which advertisements were subsequently displayed were attached to the framework by the appellant.

7. Southampton Row, Hyde Street, and Museum Street are respectively streets which are highways, the pavements, stones, and materials of which are vested in, and are under the management of and control of, the board of works for the St. Giles' district, as the surveyors of highways in the said district by virtue of s. 96 of the Metropolis Management Act, 1855.

8. Previously to the erection of the said advertising station and hoardings respectively, licences were obtained by the said builders from the said board of works granting permission for their erection in the public way of the streets in which they were respectively erected. None of these licences permitted the exhibition of advertisements on the hoardings thereby sanctioned.

9. By an agreement dated September 27, 1897, the builder of the buildings to be erected on the site 72 to 86, Southampton Row, agreed to let the appellant have the use of the hoarding, scaffold-poles, gantry, &c., at 72 to 86, Southampton Row, for the purpose of affixing thereto boards or printed bills as used by the appellant in his business of an advertising agent, at the rate of 4*l.* per week. By an agreement dated March 8, 1897, Nightingale & Co. agreed to let the appellant have the use of the hoarding at Hyde Street and Museum Street for the same purpose at the rate of 8*l.* per month. And by an agreement dated April 27, 1897, one G. D. Martin, as agent for the lessor, agreed to let the appellant have the use of the building site situate at 100 to 112, Southampton Row, for the purpose of erecting a hoarding thereon, for the purpose of affixing thereto boards or printed bills as used by him in his business as an advertising agent.

10. Each of the said agreements contained a provision that the agreement should not give the appellant any interest in

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the premises upon which the said advertising station and hoarding was or was to be erected, or in any way make him liable for rates or taxes during the continuance of the agreement.

11. Previously to affixing or displaying any advertisements upon the said advertising station or any of the said hoardings, licences have to be obtained from the board of works for the St. Giles' district, pursuant to s. 5 of the Advertising Stations (Rating) Act, 1889, granting permission to display advertisements on the station or hoardings, and no advertisements were or could lawfully be displayed on the said advertising station or upon any of the said hoardings except in pursuance of permission so obtained.

It was contended for the appellant that he was not in the exclusive occupation of the said advertising station or either of the said hoardings; that he did not permit the land upon which the hoardings were erected to be used for the exhibition of advertisements; and that he was not the rateable occupier of any of the hoardings within the meaning of s. 3 of the Advertising Stations (Rating) Act, 1889. (1)

The court of quarter sessions held that the appellant was the person who permitted the land upon which the hoardings were erected to be used for the exhibition of advertisements, and they accordingly dismissed the appeal, subject to a case for the opinion of the Court.

The question for the opinion of the Court was whether the appellant was by virtue of s. 3 of the Advertising Stations (Rating) Act, 1889, to be deemed to be in beneficial occupation of the land on which the said advertising station and the said hoardings or any of them were erected.

(1) By s. 3 of the Advertising Stations (Rating) Act, 1889, "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding, frame, post, wall or structure used for the exhibition of advertisements, but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid."

R. Cunningham Glen and *Bethune*, for the appellant. It is not enough to render a person rateable under s. 3 that he should permit the hoardings to be used for advertisements; he must permit the land to be so used. Here the appellant did not permit the land to be used for any purpose at all, for he had no control over it. The builder by whose permission the appellant affixes the advertisements to the hoardings is the person rateable: *Chappell* v. *Overseers of St. Botolph.* (1) It has been held in Ireland that the advertising agent is not the party liable to be rated under the Act: *Shelly* v. *Dillon.* (2)

Macmorran, Q.C., and *Ryde*, for the respondents. In *Chappell* v. *Overseers of St. Botolph* (1) no distinction is drawn in the judgments between the land and the hoardings erected on it. They are treated as being the same thing. It is enough that the party sought to be charged permitted the hoardings to be used for advertisements. That the appellant did here; for he did not exhibit his own advertisements, but was paid for his permission to other persons to use the hoardings for their advertisements. In *Chappell's Case* (1) the question of the liability of the advertising agent was not raised. (3)

GRANTHAM J. We are of opinion that the justices were wrong, and that their order must consequently be quashed. We entertain no doubt that the advertising agent who affixes the advertisements to the hoardings is not the person who is liable to be rated. It would be most inconvenient if he were. For though in the present case the overseers might have no difficulty in finding the advertising agent and getting the rates from him if he were to be regarded as the occupier, there would be many cases in which the difficulty would be very great.

(1) [1892] 1 Q. B. 561.

(2) (1892) 30 L. R. Ir. 304.

(3) It was further argued for the respondents that the quarter sessions had no jurisdiction to entertain the appeal on the ground that, the valuation list being conclusive only as to the value of the premises, and not as to the person liable to be rated, the appellant was not aggrieved until a rate was made and his name was inserted in the rate. But the Court declined to consider the point, as it was not raised by the case stated.

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CHANNELL J. I am of the same opinion. It seems to me to be clear that the advertising agent is not liable to be rated under this Act.

Appeal allowed.

Solicitors for appellant: *Mote & Son.*

Solicitors for respondents: *H. C. Jones.*

J. F. C.

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Dec. 7.

DUCKHAM *v.* GIBBS.

Dock—Control of Dock-master—Obstruction—West India Docks Act, 1831 (1 & 2 *Will.* 4, *c. lii.*), *s.* 101.

By s. 101 of the West India Docks Act, 1831, a penalty is imposed on every master or person in charge of any ship, lighter, &c., who places or suffers it to remain in the river Thames within 200 yards of any of the dock entrances, unless for the purpose of coming into or going out of the docks; and every master, &c., of any ship, barge, &c., so placed within such distance who does not immediately remove it from within such distance "on being thereunto required by the dock-master or dock-masters" is made liable to a fine for every hour that "such obstruction shall remain after such requisition made."

Notices requiring the removal of vessels from within the prohibited distance were signed beforehand in blank by the dock-master, and, upon a vessel mooring within that distance, the date and the name of the vessel were filled up by the lockman, who, if the person in charge refused to move, served him with the notice without consulting the dock-master as to the removal of that particular vessel:—

Held, that the notice, although only signed in blank by the dock-master and filled in by his subordinate, was a good requisition by the dock-master:

Held, further, that in order to constitute an offence under the section there need not be an actual or imminent obstruction to any particular ship or to the traffic generally, a vessel moored within the prohibited distance constituting (if not removed upon notice) an obstruction within the meaning of the section.

CASE stated by a metropolitan police magistrate.

An information had been laid by the appellant, the dock-master of the East India Docks, against the respondent, charging that he, being a person having the charge or command of a certain lighter or barge, did unlawfully on May 8, 1899, place, or permit, or suffer it to remain in the river Thames, within 200 yards of the old entrance of the East India Docks,

and refused, and did not immediately remove such lighter or barge from within such distance on being thereunto required by the dock-master, and did permit it to remain after such requisition was made a long and unreasonable time, to wit, for one hour and upwards, contrary to 1 & 2 Will. 4, c. lii. s. 101. The material facts which appeared upon the hearing of the information were as follows:—

The appellant was the dock-master of the East India Docks at Poplar, and the respondent was a lighterman.

By s. 101 of 1 & 2 Will. 4, c. lii., being an Act consolidating and amending several previous Acts for making the West India Docks, it was enacted as follows: "And for the better making and preserving of a free and clear entrance, navigation, and passage into and out of the said docks, basins, locks, and cuts, be it further enacted, that every master or other person having the charge or command of any ship, lighter, barge, boat, or other vessel of any description whatsoever, who shall place or permit or suffer the same to remain in the river Thames within 200 yards of any of the entrances to the said docks, basins, locks, or cuts, except at the said Limehouse entrance into the South Dock as aforesaid, unless for the purpose of coming into or going out of the same, shall forfeit and pay for every such offence any sum not exceeding 10*l.*; and every master or other person having the charge or command of any ship, lighter, barge, boat, or other vessel of any description whatsoever, so placed within such distance as aforesaid (whether for the purpose aforesaid or not), who shall not immediately remove such ship, lighter, barge, boat, or other vessel from within such distance on being thereunto required by the dock-master or dock-masters, shall for every such offence forfeit and pay any sum not exceeding 5*l.* for every hour that such obstruction shall remain after such requisition made; and in case the master or other person having the command of such ship, lighter, barge, craft, boat, or other vessel, shall not remove the same immediately upon being required so to do, it shall be lawful for the said dock-master or dock-masters, and his or their assistants, to remove the same."

The statute 1 Vict. c. ix. vested the East India Docks in the

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East and West India Dock Company, and applied to them the provisions of the West India Dock Company's Act above mentioned, and by the London and St. Katharine and East and West India Docks Act, 1888, the London and India Docks Joint Committee now manage the East India Docks, and have all the powers and authorities of the dock companies under the foregoing statute.

On the upper pier-head of the entrance to the East India Docks there was a notice painted up in the following terms: "No ship, lighter, barge, tug, or craft shall be made fast to or shall lie alongside of any part of this pier-head unless so ordered by the dock-master, and any person or vessel thus offending will be proceeded against as the Act of Parliament provides. J. H. Duckham, Dock-master."

On May 8, 1899, at 4.30 P.M., at which time the tide was ebbing, and would so continue for about two hours, the barge *Sapphire*, in the charge of the respondent, arrived at the dock entrance; she came there for the purpose of going into the dock, but according to the ordinary practice well known to the respondent would not be able to enter, nor would the dock gates be opened to permit the exit or entrance of any traffic, until the tide had turned and been running up for between two and three hours.

The respondent on his arrival at the pier-head was told by the appellant's lockman on duty that the barge could not remain there and must be removed. He, however, made the barge fast to the upper pier-head, within sixty yards of the entrance, but so that when the tide turned she would swing round away from the entrance. The respondent then came ashore, and was thereupon served by the lockman with a notice signed by the dock-master requiring him to unmoor and remove his vessel from the pier-head and from within the distance of 200 yards from the entrance. He did not comply with the notice or remove the barge, which was still at the pier-head at 6.30 P.M. when the lockman went away, the work of docking and undocking not beginning until about 9.30 P.M.

It appeared from the evidence of the lockman that until May 1, 1899, it had been the practice for barges to make fast

to the pier-heads in a similar position to that occupied by the *Sapphire*; that on that day the lockman had general instructions from the dock-master to prevent barges from making fast to the pier-head, and that he told the respondent to move, and served him with the notice under such general instructions; that he had no specific orders as regards the respondent's barge, but that with the general instructions the witness was supplied with similar notices signed beforehand in blank by the dock-master, the date and name of the barge being filled up by the lockman, who, if the person in charge refused to move, served him with the notice without consulting the dock-master as to the particular barge.

The respondent contended that the notice was not a sufficient and proper requisition of the appellant as the dock-master to bring the respondent within the section; and, further, that no offence could be committed under the latter part of the section until obstruction to the traffic, actual or imminent, had been proved to have been caused by him.

The magistrate was of opinion that the appellant could not give his assistants general instructions to see that barges and lighters did not moor within the prescribed limits, and that before an offence under the section could be committed special instructions applicable to each particular vessel must be given by the appellant; he therefore dismissed the summons. He was further of opinion that there was no evidence that any particular vessel entering or leaving the dock had in fact been obstructed, but that upon the true construction of the section proof of such obstruction was not necessary to the proof of an offence under the latter part of the section.

George Wallace, for the appellant. The learned magistrate was wrong in holding that the notice was not a proper and sufficient requisition by the dock-master to bring the respondent within s. 101. There is nothing in the language of that section, or in the reason of things, to compel the Court to hold that a dock-master, who has full power over a certain area, may not say in advance that any vessel lying in a particular area is an annoyance and must be removed. It is not necessary or

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material in each case to consider the particular vessel that is offending; the important point to look at is the place where the vessel is lying. In *The Excelsior* (1) the duties and powers of dock-masters were considered, and it is clearly the duty of a shipowner and his servants to obey the dock-master's orders. It would be unreasonable to hold that the dock company must appoint relays of dock-masters, so that one may always be in attendance at each entrance of the docks; it is sufficient if the dock-master signs a proper form of order in advance, leaving the name of the ship and the date to be filled in by an assistant.

J. A. Hamilton, for the respondent. No offence within the section was made out. First, the requisition was insufficient. The company has power under s. 100 to appoint more than one dock-master, and the use of the word "dock-masters" in the plural in s. 101 shews that the intention of the Legislature was that some personal authority should be necessary to a good requisition. The requisition must be founded on a discretion which can only be exercised in each case by the dock-master. Secondly, an obstruction to navigation, actual or imminent, is the essence of the offence. There was no navigation going on at the time that could be obstructed, as the dock gates would not open for another two hours.

[CHANNELL J. Does not "obstruction" mean a vessel which is within the prescribed distance of the dock entrance?]

No; there can be no obstruction except when a vessel wants to get into or out of the dock, and it is the actual operation of going in or coming out that must be interfered with; the penalty, too, depends upon the length of time during which the obstruction continues.

George Wallace was not called upon to reply.

DARLING J. The first question for our decision was decided by the learned magistrate in favour of the respondent. It was contended, and the magistrate agreed with the contention, that no offence was committed against s. 101, because after the respondent's lighter had been moored within the 200 yards' limit the dock-master did not himself come and give to the

(1) (1868) L. R. 2 A. & E. 268.

man in charge of the particular barge a direction that it must be removed. What he in fact did was to fill up and sign requirements to masters of barges which might commit such an offence and hand them to a subordinate, who, when a barge was moored within the prescribed distance, took one of these signed forms, filled it in with the date and the name of the barge, and served it on the master. It was contended on behalf of the dock company that this was a good requisition to remove the barge within the meaning of the Act, but the learned magistrate found that it was not. I am of opinion that that decision was wrong. I think that what was done amounted to a requisition by the dock-master, and there is nothing in the Act to shew that the requirement must be made personally by him to the man in charge of the barge; the barge, when it was once brought within the limit of 200 yards, became in my opinion a thing which the dock-master had a right to order away, and I can see no reason why he should not exercise that right by means of an order or requisition signed by him before the barge came there, and subsequently filled in by his subordinate.

On the second point raised, that in order to constitute an offence under the section there must have been an actual or imminent obstruction to the traffic, the learned magistrate decided against the respondent; he held that such obstruction to a particular vessel need not be shewn. I cannot agree with the respondent's contention, and I think that it was properly overruled by the learned magistrate. I think that s. 101 means this. In the first place it says that craft are not to moor within 200 yards of a certain place; then it goes on to say that if any barge does moor within that distance its master may be required by the dock-master to remove it, and on his failure to do so he becomes liable to a fine for every hour that the obstruction remains. I do not think that the section requires that any particular vessel should be in fact obstructed, or that the offending vessel should be in such a position that an obstruction is imminent; it means in my opinion that directly a lighter is moored within 200 yards of the forbidden spot it becomes an obstruction: it is a lighter in a forbidden place, and

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must be removed directly its removal is required. It is then, at any rate, an obstruction, and is so spoken of in the section, and that because it is in the forbidden area in defiance of the dock-master's notice, apart altogether from the question whether it is an obstruction to a particular ship or to the traffic generally. In the result, therefore, I think that the appeal must be allowed.

CHANNELL J. I am of the same opinion on both points. The second point becomes, I think, quite clear when one considers the use of the word "such" in the section. No ship is to moor within 200 yards of a certain spot, and "such" ship—that is, one moored within the prohibited area—becomes an obstruction if not removed upon notice, a penalty being imposed for each day that "such" obstruction continues. That is really the respondent's main point. Assuming it to be an obstruction, the section says that no vessel not going into dock may moor within a certain area, and it creates a liability to a penalty for the mere act of mooring within that area. Then the section goes on to impose a continuing penalty for every hour that "such" obstruction continues after a requisition to remove it. What is the requisition that is spoken of? It is a requisition, or an order, given by the dock-master to remove the offending vessel. It is suggested by the respondent that in each case the dock-master must personally come and look at the position of things before the requisition is served on the master of the vessel. But why should he? A vessel which is moored within the prohibited area and is not intending to go into the dock is already subject to the penalty imposed by the section, and in my judgment it is quite sufficient if the dock-master authorizes his assistant to say whether the vessel shall be removed; I will not give any opinion as to whether the assistant, without any authorization by the dock-master, could himself make such an order. In the present case it is clear that there was a good requirement.

Appeal allowed.

Solicitors for appellant: *Hillearys.*

Solicitors for respondent: *Keene, Marsland & Co.*

W. J. B.

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Nov. 17;
Dec. 21.

Common Lodging-house — Liability to Penalty for Keeping — Charitable Institution — Non-registration — Common Lodging Houses Act, 1851 (14 & 15 *Vict.* c. 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict.* c. 41).

Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging-house, unless his name as the keeper thereof be entered in the register kept under" the Common Lodging Houses Act, 1851.

The respondent kept a house or "shelter" for the reception of male lodgers as part of a social scheme carried on by a body called the Salvation Army, the lodgers being admitted by the officials in charge under certain regulations made for the carrying out of the objects of the scheme. The lodgers were charged 4*d.* a night or 2*s.* a week for a bed or bunk in an open dormitory and the use in common with the other occupants of a sitting or meeting room and a kitchen; the occupants provided their own food, which they might cook at the kitchen fire. The officials in charge had a discretionary power to admit persons for a less payment or for no payment at all. Drunken or disorderly men were not admitted, or, if admitted, were turned out, the occupants being of the same class as the occupants of common lodging-houses, except that some of those received were so dirty that they would not be received in a common lodging-house. The shelter was kept for charitable or religious objects, and not for purposes of gain; the charges were the same as at common lodging-houses kept for commercial profit, but no profit was in fact made out of the shelters carried on under the scheme. The respondent's name was not entered in the register of common lodging-houses as the keeper of the shelter:—

Held, that the fact that the shelter was kept for charitable or religious objects and not for purposes of gain did not take it out of the operation of the Common Lodging Houses Acts, 1851 and 1853; that the shelter was common lodging-house within the meaning of those Acts, and that the respondent had been guilty of the offence of keeping a common lodging-house without having his name registered as the keeper thereof.

Booth v. *Ferrett*, (1890) 25 Q. B. D. 87, overruled.

CASE stated by the chief metropolitan police magistrate.

An information had been laid by the appellant on behalf of the London County Council against the respondent, charging him with having, contrary to the provisions of the Common Lodging Houses Act, 1853, kept a common lodging-house without the name of the respondent being entered as the keeper

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thereof in the register kept under the Common Lodging Houses Act, 1851. (1) The learned magistrate dismissed the information subject to the following case.

1. A house, known as "the Harbour," Stanhope Street, in the parish of St. Clement Danes, was, on May 16, 1899, kept by the respondent as one of the shelters established on behalf of the Salvation Army in that part of what it terms its "social work" in connection with what is called the "Darkest England Scheme," and was used for the reception and lodging of persons admitted by officials in charge of the shelter on behalf of the Salvation Army under and in accordance with the "orders and regulations" (pp. 178 to 214) hereinafter mentioned as being put in evidence, and persons so admitted were charged either 4*d.* a night, or 2*s.* a week, for a bed and the use in common with other occupants of the rooms hereinafter mentioned. The officials in charge of the shelter had such discretionary power as arises under the "orders and regulations" to admit persons for a less payment or with no payment if they thought fit so to do, and such persons when so admitted would in like manner have each a bed and the use of the said rooms. The name of the respondent was not entered as the keeper of the house in the register of common lodging-houses kept under the Common Lodging Houses Act, 1851.

2. On May 16, 1899, there were in the house 157 beds, or bunks. On the ground floor there was an open dormitory, not divided into cubicles, containing nine bunks for eighteen occupants. On the five upper floors were open domitories, not divided into cubicles, containing in all 137 beds and one bunk for two occupants. The bunks were placed one above the other in the same manner as berths are placed in the cabin of a ship, and were used only in those rooms where there was not sufficient floor-space to provide beds for the same number of occupants as could be accommodated in the bunks.

3. On the ground floor of the said house there were a sitting or meeting room and a kitchen, both of which were used in

(1) The Common Lodging Houses Acts, 1851 and 1853, are repealed, except so far as relates to the metropolitan police district, by the Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 343 and Sched. V.

common by all the occupants. Any occupant when admitted was entitled to cook his food at the fire provided in the kitchen, but had to provide his own food, and was not provided by the respondent with any food in consideration of either of the above payments.

4. Only men were admitted as occupants of the shelter. Men who were drunk or disorderly were not admitted, or, if they had been admitted, were turned out.

5. The occupants were of the same class of men who generally sleep in registered common lodging-houses, save that some of the occupants received at the shelter were so dirty that they would not usually be received in a registered common lodging-house.

6. Evidence was tendered on behalf of the appellant which it was asserted would shew—(1.) that if all the beds were occupied the house would be overcrowded, and (2.) that the house and the beds, bedding, and utensils therein were in an uncleanly and insanitary condition. The whole of this evidence was objected to by the respondent, and was rejected by the magistrate on the ground that it was irrelevant to the question in issue—whether the shelter was a common lodging-house within the provisions of the Common Lodging Houses Acts.

7. The house was kept as a Salvation Army shelter by the respondent for charitable or religious objects, the keeping of the house being part of the social work promoted by a body of persons known as the Salvation Army in connection with the "Darkest England Scheme," and acting under the orders of the respondent, and the receipts of the shelter were carried to the funds of the "Darkest England Scheme Trust" through the medium of the officials of the Salvation Army.

8. In the accounts kept by the Salvation Army of the working of all the shelters used in connection with the scheme for the year ending September 30, 1898, being the last year the accounts of which were available, the receipts in respect of the shelter known as "the Harbour" were put down at 972*l.* 10*s.* 11*d.*, and the outgoings for purchases, wages, and expenses in respect thereof at 972*l.* 11*s.* 8*d.*, and in the outgoings were included certain estimated expenses of management

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for work done at the headquarters of the Salvation Army at Whitechapel in connection with all the shelters used in connection with the said scheme (including "the Harbour"), and not at the shelter at Stanhope Street. The same accounts shewed an increase of 124*l.* 17*s.* 6*d.* in respect of the value of stock on hand on September 30, 1898, as compared with September 30, 1897, at divers shelters (including the shelter in Stanhope Street) under the control of the respondent used in connection with the scheme, but it did not appear whether all or any of the increase in value was represented by stock in the shelter in Stanhope Street. It also appeared from the accounts that for that year on the working of all the shelters throughout England there was a loss of over 600*l.*

9. It was proved that in common lodging-houses in the county of London which are kept for the purpose of making a commercial profit and not for charitable objects there are about 13,000 beds let at the same price as that charged by the respondent for beds in the shelter.

10. The appellant tendered the evidence of certain keepers of registered common lodging-houses, who, it was alleged, could shew that they had made and still made a profit by keeping such lodging-houses while charging the same prices for beds as those charged by the respondent, but the evidence was objected to on behalf of the respondent, and was rejected as irrelevant.

11. The book called "Orders and Regulations for Social Officers" was put in, and pp. 178–214 are to be taken as part of this case, as being the rules under which the shelters (including the one in Stanhope Street) are directed to be carried on.

12. It was contended on behalf of the respondent that the shelter called "the Harbour," having been kept and used as one of the shelters worked by the Salvation Army social officers in connection with the scheme, and according to the orders and regulations, was not a common lodging-house within the Common Lodging Houses Acts, 1851 and 1853, and the case of *Booth* v. *Ferrett* (1) was cited as an authority to that effect.

(1) 25 Q. B. D. 87.

13. It was contended on behalf of the appellant—(1.) that the case of *Booth* v. *Ferrett* (1) was wrongly decided; (2.) that it was distinguishable from the present case on the ground that the shelter, if it was so overcrowded, dirty, and insanitary as alleged, would be dangerous to the community, whereas the premises to which the decision in *Booth* v. *Ferrett* (1) related were assumed by the Queen's Bench Division to be free from such dangerous conditions; (3.) that the case of *Booth* v. *Ferrett* (1) was distinguishable on the ground that in the present case a profit was made by the respondent, or might be made by him if he carried on the shelter with reasonable care and skill, and that the application of such profit (if profit were made) to a charitable purpose did not make the said lodging-house a charitable institution within the decision in the case of *Booth* v. *Ferrett*. (1)

14. The learned magistrate held that the facts proved in the case were not distinguishable from those in *Booth* v. *Ferrett* (1), and that the shelter was not a common lodging-house within the Common Lodging Houses Acts, 1851 and 1853.

15. The questions for the opinion of the Court were:—

(i.) Whether this case is distinguishable from the said case of *Booth* v. *Ferrett*. (1)

(ii.) If not, whether the said case was rightly decided.

(iii.) Whether on the facts above stated the said shelter was a common lodging-house within the Common Lodging Houses Acts, 1851 and 1853; and

(iv.) Whether all or any of the evidence tendered on behalf of the appellant was wrongly rejected.

Jelf, Q.C. (*Ryde* with him), for the appellant. The intention of the Common Lodging Houses Acts of 1851 and 1853 was to treat the housing of large numbers of persons from the lowest ranks in common rooms as a grave public question, and therefore provision was made for the registration of such places and for their inspection on behalf of the public. The respondent's "shelter" was a common lodging-house within those Acts,

(1) 25 Q. B. D. 87.

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for the "regulations" of the Salvation Army shew that they were dealing with the very class of people intended to be dealt with by the Acts; there is, indeed, a finding in the case that people were taken in at the shelter in so dirty a condition that they would have been refused admission into a common lodging-house. The Acts of 1851 and 1853 are sanitary Acts, and no distinction can properly be founded on the fact that the shelter was not carried on for the purpose of gain; there is no suggestion in the statutes of any such distinction, and the case of *Booth* v. *Ferrett* (1), which recognised such a distinction, was wrongly decided and should be overruled. Nor is it necessary that a common lodging-house should be open to all members of the public; a keeper of a common lodging-house is not under the same liability as a common innkeeper. The decision in *Langdon* v. *Broadbent* (2), and the reasons given by Grove and Lindley JJ. in their judgment, constitute a strong authority in favour of the appellant. [He also referred to the opinion of Sir A. E. Cockburn and Sir W. Page Wood, cited in Glen on Public Health, 12th ed. p. 163; Lumley on Public Health, 5th ed. p. 99.]

Pollard (*Mark Waterlow* with him), for the respondent. The shelter was not a common lodging-house. While it is the respondent's aim to make the shelters as far as possible self-supporting, the case shews that there is one common account to which all the shelter accounts are carried, which shewed a loss of about 600*l.* a year. The shelter was, therefore, not carried on for purposes of gain, which distinguishes it from the ordinary common lodging-house. *Booth* v. *Ferrett* (1), in which that distinction was drawn, was rightly decided, and in any event has been acted upon for so long that it ought not, being a decision of a court of co-ordinate jurisdiction, to be overruled unless it is clearly wrong: *Hadfield's Case.* (3) Since the decision of *Booth* v. *Ferrett* (1) the Legislature, with full knowledge of it, has passed the Public Health (London) Act, 1891, which is a consolidation Act and in pari materiâ with the former legislation on the subject; this is an additional

(1) 25 Q. B. D. 87. (2) (1877) 37 L. T. 434.
(3) (1873) L. R. 8 C. P. 306.

reason for not overruling it. Further, in the expression "common lodging-house" the word "common" is used with the same meaning as it has in the expressions "common inn" and "common carrier"; a common lodging-house is one which must take in any applicant; here discretion was used as to the persons admitted. If the shelter is so conducted as to be a nuisance, it may be dealt with under the Public Health (London) Act, 1891, as was done in *Reg.* v. *Slade.* (1) [He also cited *Winyard* v. *Toogood* (2); *Reg.* v. *Parlby.* (3)]

Jelf, Q.C., in reply.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Lord Russell of Killowen C.J., Bigham and Darling JJ.) was delivered by

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the decision of the chief metropolitan magistrate on the hearing of an information laid by the appellant against the respondent charging the latter with keeping, contrary to the Common Lodging Houses Act, 1853, a common lodging-house known as "the Harbour," Stanhope Street, St. Clement Danes, without the name of the respondent being entered as the keeper thereof in the register kept under the Common Lodging Houses Act, 1851. The learned magistrate dismissed the charge on the authority of the decision of a Divisional Court in the case of *Booth* v. *Ferrett* (4), in which the present respondent was the appellant.

The questions which arise for our determination are as follows: (1.) Is *Booth* v. *Ferrett* (4) in principle distinguishable from this case? (2.) If not, was that case rightly decided? And (3.) if not rightly decided, ought we now to review it?

The material facts are to be found in paragraphs 1, 2, 3, 4, 5 and 7 of the case, and to these I will briefly refer. Paragraph 1 states that "the Harbour," the house in question, is kept by William Booth, the respondent, as one of the shelters established by the Salvation Army as part of their social work

(1) (1896) 65 L. J. (M.C.) 108.
(2) (1882) 10 Q. B. D. 218.
(3) (1889) 22 Q. B. D. 520.
(4) 25 Q. B. D. 87.

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in connection with what is called the "Darkest England Scheme." It is conducted upon the basis of orders and regulations to which I will in a moment refer. Various prices were charged, low prices for the night's lodging, varying from a very low figure. The case states that the persons who were admitted were charged either 4*d.* a night or 2*s.* a week for a bed and the use in common with other occupants of certain rooms. The officials in charge of the shelter had a certain discretion to admit persons for a less payment or with no payment, and such persons when admitted would in like manner have the use of a bed and the use of the rooms. The case then proceeds to shew that on May 16 there were 157 beds or bunks; that on the ground floor there was an open dormitory not divided into cubicles; that on the five upper floors were open dormitories, not divided into cubicles, containing in all 137 beds, and one built for two occupants. The bunks were placed one above another in the same manner as berths are placed in the cabin of a ship. On the ground floor there was a sitting or meeting room, and a kitchen, and any occupant when admitted was entitled to cook food at the fire, and to have the use of it in common with the other persons admitted. Paragraph 4 states that only men were admitted as the occupants, and men who were drunk or disorderly were not admitted, or, if admitted, they were turned out. Paragraph 5 states that the occupants were of the same class of men as the men who generally sleep in registered common lodging-houses, save that some of the occupants received at "the Harbour" were so dirty that they would not be usually received in a common lodging-house. Paragraph 7 states that the house was kept for charitable or religious objects, the keeping of the house being part of the social work of the Salvation Army, and the receipts of the shelter were carried to the fund of the Darkest England Scheme Trust by the officials of the Army. Then there is a paragraph to which it is unnecessary to refer at length, paragraph 8, as to whether or not a profit was or might be made in fact by the keeping of some of these shelters or harbours. I do not think it is necessary to read paragraph 9, but it is to be taken further that, although according to the

principles laid down by the orders and regulations the place was to be conducted on a business basis, it was not for the object of personal gain to the respondent and those acting for him and under his instructions.

It is necessary to refer to pp. 179, 180, 187, and 188 of the regulations. At p. 179 it is stated the charges made are within the reach of the poorest. I am not reading each word and every word of each of these clauses; I am referring to the points to which I desire to call attention. The shelters afford this accommodation, not as a work of charity only, but on a business basis, so that the inmates are not demoralised by charity, knowing that they pay for what they have and have only what they pay for. In the shelters the very outcasts of society are brought, for a season at least, into conditions of health and cleanliness. Next, there are certain religious exercises and meetings held, at which attendance is not compulsory. Then at p. 180 it is provided that the shelters are not to be allowed to become the permanent homes of men who are able to pay more for the accommodation than the shelter provides. Again, the shelter must not be allowed to assist idle men in their efforts to live a lazy life. Next, the shelter must not be permitted to become in any way a channel or means for the dissemination of disease. Then there are certain provisions as to bringing influence to bear on the inmates, and as to endeavouring to find employment for them, and a number of provisions, very carefully framed apparently, if rigorously carried out, to promote the preservation of health.

The "Harbour" so described and so conducted in no material particular differs from the house the subject of inquiry in *Booth* v. *Ferrett*. (1) We therefore think that the present case is not in principle different from that case.

The next inquiry is, was that case rightly decided? The learned judges in *Booth* v. *Ferrett* (1) came to the conclusion (but with hesitation) that a similar house, and similarly conducted to the present, was not a common lodging-house, on two grounds: (1.) that it was not carried on as a business for the sake of profit, but as a humane or charitable enterprise;

(1) 25 Q. B. D. 87.

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and (2.) that it was not open to all comers as (it was stated) a common lodging-house was.

Before examining these grounds of decision more closely, it will be well to examine the scheme of legislation on this subject and endeavour to get a clear conception of its object. It is not necessary to go further back than the Act of 1851. That Act (14 & 15 Vict. c. 28) is called the Common Lodging Houses Act, 1851, but it gives no definition of what a common lodging-house is. Sect. 6 authorizes the local authority by notice to require the keeper of any common lodging-house to register such house; and s. 9 empowers such authority to make regulations respecting common lodging-houses; and by s. 10 the same authority may impose penalties upon offenders against the regulations. Sects. 11, 12, and 13 contain provisions as to notice of infectious diseases, for inspection at all times when required by any officer of the local authority, and as to the cleansing of such common lodging-houses and the drains, &c., thereof. Sect. 14 enacts the penalties for offences against the Act.

The Act of 1853 (16 & 17 Vict. c. 41) makes further provision with respect to common lodging-houses. It is to be read with the Act of 1851. Sect. 3 provides that no person shall keep a common lodging-house until the house has been inspected and approved on behalf of the local authority and registered under the Act of 1851. By s. 4 it is provided that the local authority may refuse to register any person as keeper of a common lodging-house who does not produce a certificate of character signed as there mentioned. There are other provisions which it is not necessary to detail, as to reports from the keepers where beggars and vagrants are received; as to powers to remove causes of complaint under the Nuisances Removal Act, 1848, in relation to such common lodging-houses; and by s. 11 the provisions of s. 14 of the Act of 1851 as to penalties are made applicable to offences under the Act of 1853.

The Acts of 1851 and 1853 are clearly sanitary Acts. They deal with houses to which the very poorest and most wretched class of the population resort, and with conditions in which members of that class herd together, availing themselves of the

sordid accommodation offered, for which a very low price is charged. In such persons uncleanliness to a large extent, unhealthiness, and even actual disease—infectious or non-infectious—will probably be found to exist. If, therefore, care is not taken to insure cleanliness and other healthy conditions as to air supply, water supply, and so forth, these houses may become a source of danger, not only to the lodgers, but to the general public. The legislation, therefore, on this subject had for its object, by inspection and control, to secure for the poor in these houses conditions safeguarding health and preventing the spread of disease, which people better off are supposed to be able to secure for themselves: see per Lindley J. in *Langdon* v. *Broadbent*. (1)

The statutes in question are therefore to be regarded simply as measures of sanitary protection. Applying these considerations to the first ground on which the decision in *Booth* v. *Ferrett* (2) was based, it seems impossible to admit that the fact that the house or building in question was carried on for charitable objects, and not for gain, would take it out of the measure of sanitary protection, if otherwise it would be within it. The question is not with what object or prompted by what motive the house is carried on, but whether the house is such, and is so carried on as a lodging-house, as to be within the provisions of the Act, as it is clearly within the mischief aimed at by the Act. It is to be observed that the learned judges in *Booth* v. *Ferrett* (2) differentiate the house in that case from a common lodging-house only on the two grounds which I have mentioned. If large numbers of the most wretched class are lodged in common sleeping-rooms, insanitary conditions are, in the absence of inspection, supervision and control, likely to arise, and it was the object of the law to secure that inspection, supervision, and control. We fail to see the relevance, in this connection, of the motive actuating the keeper of such a house, whether it be philanthropic or mercenary.

But the second ground of the decision is that "the Harbour" is not within the statute on the ground that a common lodging-house is open to all comers in this sense, that the keeper of

(1) 37 L. T. 434. (2) 25 Q. B. D. 87.

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such a house cannot refuse admission to any applicant. Is this so? To give to a common lodging-house this character is to attach to its keeper obligations analogous to those of a common carrier or a common innkeeper. We are unaware of any authority for this position. The language of Lindley J. in *Langdon* v. *Broadbent* (1) is referred to where he speaks of a common lodging-house as one "open to all comers," that is, as we understand the language, where practically all comers are received without discrimination; but that is a very different thing from saying that the keeper is under an obligation to receive all comers. We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunken or disorderly or uncleanly men, or men of known evil reputation, as thieves and the like, or indeed any persons whom he chose to exclude. Further, it seems to us on the facts before us that "the Harbour" might properly be described as open in the same sense to all comers. In fact, practically all comers are admitted. The very "outcasts of society" (see p. 179 of the regulations) are objects of the humane solicitude of the respondent. Even verminous subjects who are willing to submit to cleansing operations are admitted, and in paragraph 5 of the case before us it is stated that the occupants of "the Harbour" are of the same class as those who frequent registered common lodging-houses, but that into "the Harbour" are received persons who would usually be refused admission, because of their filthy condition, into common lodging-houses. The only restrictions on admission which may suggest a difference between "the Harbour" and registered common lodging-houses are the regulations—(1.) that men who are able to pay for better accommodation are not allowed to make "the Harbour" their permanent home, and (2.) that "the Harbour" is not to be used to assist idle men to live a lazy life. We cannot assent to the view that this is sufficient to differentiate the two classes of houses.

We know of no better description of a common lodging-house than that given many years ago by the law officers, Sir Alexander Cockburn and Sir W. Page Wood, to the effect that

(1) 37 L. T. 434.

a common lodging-house was that class of lodging-house in which persons of the poorer class are received for short periods, and, although strangers to one another, are allowed to inhabit one common room: Glen's Public Health, 12th ed. p. 163; Lumley's Public Health Act, 5th ed. p. 99. If this be the proper description of a common lodging-house, as we think it is, we cannot see in what material respect it differs from the respondent's shelter.

We arrive, therefore, without hesitation at the conclusion that this shelter is a common lodging-house within the meaning of the Act of 1853. It follows that we think *Booth* v. *Ferrett* (1) was wrongly decided, and that the magistrate's decision now given was wrong in point of law. It is to be observed, however, that the magistrate in question decided in deference to the authority of *Booth* v. *Ferrett* (1), and indeed that the same magistrate had in that very case decided that the shelter was, in his judgment, a common lodging-house. We desire to point out that in delivering his judgment Lord Coleridge was careful to say that he delivered it without any great degree of confidence.

Differing from the decision of the Court in that case, ought we nevertheless to act upon it? We think not. The case being criminal in its nature could not have been brought under review by appeal. It was decided only nine years ago, and there has been no such acceptance of it and no such action upon it as should preclude us from expressing the view of the law which we are convinced is right.

It was indeed argued by the learned counsel for the respondent, that since that case was decided there had been legislation on this subject, and that the Legislature has not seen fit to alter the law, but in effect has recognised it to be as declared in *Booth* v. *Ferrett*. (1) Is this so? If, indeed, it could be shewn that the Legislature had subsequently legislated in a way which demonstrated that it was accepting and adopting the law as so laid down, and that it proceeded to further legislate on the express or clearly implied acceptance of that

(1) 25 Q. B. D. 87.

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declaration of the law, we ought not to disturb the decision in question. But is it so? We think not. The legislation referred to is the Public Health (London) Act, 1891. The provisions in that Act are not provisions directed to the subject of common lodging-houses. It is a general Act consolidating and amending the laws relating to public health in London. It deals with nuisances, offensive trades, smoke consumption, removal of refuse, water-closet regulations, unsound food, provisions as to water, notification and prevention of infectious diseases, and the like. No doubt some of its provisions are applicable to lodging-houses in common with all other houses, but it is noticeable that s. 94, which alone refers to houses let in lodgings, and which enables the sanitary authority to make by-laws as to them, expressly excepts common lodging-houses from this class. We conclude, then, that there has been no legislation which adopts or proceeds upon a recognition of the law as declared in *Booth* v. *Ferrett*. (1)

Our answer, therefore, to the questions put to us in the case are as follows: As to the first question, we say that this case is not distinguishable in principle from the case of *Booth* v. *Ferrett*. (1) As to the second question, we say that the case of *Booth* v. *Ferrett* (1) was wrongly decided. As to the third question, we say that the respondent's lodging-house was a common lodging-house within the Acts of 1851 and 1853. These answers render it unnecessary to consider the question of the admissibility of the evidence tendered by the appellant and rejected by the magistrate. The result is that the appeal will be allowed, and that the case will be remitted to the learned magistrate with an intimation of our judgment upon it. Under the circumstances, there will be no costs of the appeal, and having regard to the decision of *Booth* v. *Ferrett* (1), on which the respondent was justified in acting, the learned magistrate will no doubt think that the smallest nominal fine will meet the justice of the case.

We desire to say that we should regret if the result of our

(1) 25 Q. B. D. 87.

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decision were seriously to interfere with the humane work of the respondent. We do not think it will or can; but, whether it does or not, the law must be observed. We have read the careful regulations framed for the good government of "the Harbour" and the respondent's other similar houses, and noticed the anxiety manifested in those rules not only to insure observance of all conditions necessary to secure cleanliness and good health, and to prevent the growth and the spread of disease, but also to observe the law, whatever that may be. Indeed, Part II., Chap. II., rule 24 of the respondent's regulations expressly provides that every shelter shall be fitted up in accordance with the requirements of the sanitary authorities of the district. On the other hand, we trust that those who are charged with the enforcement of the law will do all they can consistently with their duty and consistently with effecting the objects of the law to avoid anything like harshness or unreasonableness in its enforcement.

Appeal allowed.

Solicitor for appellant: *Blaxland.*
Solicitors for respondent: *Ranger, Burton & Frost.*

W. J. B.

1899
Nov. 7;
Dec. 21.

ARMSTRONG *v.* LONDON COUNTY COUNCIL.

Metropolis—Building Acts—Street—Commencing to form or lay out Street without Leave of County Council—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.

In order that a road or carriageway may be a street within the meaning of s. 7 of the London Building Act, 1894, it is not necessary that it should be intended or used for public carriage traffic.

The owner of a building estate, of about four acres in extent, commenced to lay out a road which communicated at one end with a public carriageway; the other end of the road ran into a square, about which it was intended to build a continuous line of houses or flats; houses or blocks of flats were also to be built along each side of the road itself, the total length of the road being about 600 feet. It was further intended to erect gates at the point where the road ran out of the public carriageway, and to keep a porter to open and shut the gates. The road was not intended for public use, but solely for the use of the occupiers of the houses in the road and square, and of their visitors and tradespeople. The owner had not obtained the consent of the London County Council before commencing the work:—

Held, that the road was a street within the meaning of s. 7 of the London Building Act, 1894, and that the owner was properly convicted under that section of having commenced to form or lay out a street for carriage traffic without having first obtained the sanction of the London County Council.

Wood v. *London County Council*, (1895) 64 L. J. (M.C.) 276, overruled.

CASE stated by justices for the county of London upon the hearing of an information laid on behalf of the respondents whereby it was alleged that the appellant, in the months of July and August, 1898, at the Cleveland estate, near the Highgate Road, did, contrary to the provisions of s. 7 of the London Building Act, 1894 (1), commence to form and lay out a street

(1) By s. 7 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), "Before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, such person shall make an application in writing to the council for their sanction to the formation or laying out of such street either for carriage traffic or for foot traffic (as the case may be):

"Every such application shall be accompanied by plans and sections with such particulars in relation thereto as may be required by printed regulations issued by the council,

for carriage traffic without having first obtained the sanction of the council to the formation or laying out thereof. The facts were as follows:—

1. In July, 1898, the appellant commenced to erect upon a piece of land 3A. 3R. 39P. in area, known as the Cleveland estate, of which he is the owner, and which adjoined a public carriageway called the Grove, which said public carriageway communicated by another narrow public carriageway some fifteen feet wide with the Highgate Road, certain buildings in accordance with building notices and a plan which had previously been given to the district surveyor.

2. The said piece of land, except where it abuts on the public highway called the Grove and on the public park vested in the respondents known as Parliament Hill on its south-western side, was and still is bounded by private lands. No public right of way exists over any portion of the said piece of land, and no means of access to it from any public carriageway or footway exists other than that afforded by the said public carriageway known as the Grove and by a private right of way for foot-passengers, through a gateway three feet in width in the boundary fence of the said public park to a public footpath in the said park.

3. It is proposed by the appellant to remove certain old buildings shewn on the plan, and to lay out the said piece of land and erect new buildings thereon in the manner shewn upon the plan annexed to this case marked "A"—that is to say, the appellant proposes to erect twenty new buildings or blocks of flats, each block containing eight flats, of which sixteen blocks will be erected in a quadrangular form with an ornamental garden in the centre of the quadrangle formed by such blocks. The approach to the said buildings will be by means of a carriageway from the Grove running round the said garden, and upon each side of such carriageway between the Grove and the said garden will be erected two or more of

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and the council shall forthwith communicate every such application to the local authority:

"And no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the council."

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the said blocks. Each of the said blocks will have a separate entrance from the said carriageway. The said approach from the Grove and also the carriageway around the said ornamental garden will be forty feet in width, and such approach and carriageway will be of a total length of 600 feet.

4. The drainage plans for the said buildings had been submitted by the appellant to the vestry of St. Pancras, upon which were shewn the levels of a sewer it was proposed to construct running along and round the said carriageway, with the intended levels of the connecting drains from each of the said buildings. The said plan also shewed the position of the manholes and gullies similar to street gullies which it was intended to construct in connection with the sewer, and the mode in which it was intended to connect the said sewer with the sewer belonging to the said vestry in Highgate Road, and also shewed that the said carriageway would be formed and sewered in all respects in the way in which a carriageway of an ordinary street would be formed and sewered. It was admitted, however, that gullies similar to those shewn on the said plan would be required for draining a stable-yard or any other yard.

5. The appellant does not propose to dedicate any right of way to the use of the public over the said piece of land, but intends to erect gates at the entrance to the said approach, and to keep a porter at such entrance to open such gates when necessary to allow persons going to or from any of the said flats to pass, so that the public will not be entitled to enter the said approach. There will be no entrance or exit to or from the said flats into the said public park called Parliament Hill, and the said carriageway will be for the use only of the tenants of the flats in the said proposed new buildings, and the tradesmen and others visiting them on business or pleasure with or without carriages, but the appellant is not under any covenant to maintain the said gates or the said porter.

6. Prior to the commencement of the said buildings application in writing had been made to the London County Council by the appellant for the sanction of that council to the formation or laying out of a street for carriage traffic on the site in question. The plans annexed to such applications did not shew

any gates at the junction of the Grove, but shewed a through communication with the footway upon Parliament Hill, and such sanction was refused on the ground that the proposed street would not afford direct communication between two streets formed and laid out for carriage traffic, and no sanction had been given by the respondents to the formation or laying out of the alleged street in question.

7. It was contended on behalf of the respondents that the appellant had under the circumstances aforesaid commenced to form or lay out a street for carriage traffic contrary to s. 7 of the said Act, and that the case was governed by *Daw* v. *London County Council*. (1) It was contended on behalf of the appellant that he was merely forming a private courtyard or a private carriage drive and approach to the buildings he proposed to erect upon the said land, and that such carriage drive and approach were not intended to be used for carriage traffic or for foot traffic only within the meaning of s. 7 of the Act of 1894, and that the case was governed by *London County Council* v. *Davis* (2) and *Wood* v. *London County Council*. (3)

8. Plans of the alleged streets in the cases relied on by the appellant and respondents respectively were produced, shewing that in *London County Council* v. *Davis* (2) the alleged street was 200 feet in length, the number of separate buildings on it two, and the area of land 1 rood 25 poles; that in *Wood* v. *London County Council* (3) the alleged street was 145 feet in length, the number of buildings on it three, and the area of land 1 rood 28 poles; and that in *Daw* v. *London County Council* (1) the alleged street was 710 feet in length, the number of buildings on it twelve (since increased to thirty-eight), and the area of land 3A. 3R. 2P. The justices found as a fact that the carriageway in question in the present case would when formed be a street, and held that the appellant had under the circumstances commenced to form and lay out a street for carriage traffic within the meaning of s. 7 of the London Building Act, 1894. They accordingly convicted the appellant, and imposed a penalty of 20*s*. and costs.

(1) (1890) 59 L. J. (M.C.) 112. (2) (1895) 64 L. J. (M.C.) 212.
(3) 64 L. J. (M.C.) 276.

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The question for the opinion of the Court was whether the justices were right in so holding.

Macmorran, Q.C. (*R. Cunningham Glen* with him), for the appellant. The case substantially raises two questions for decision—(1.) the meaning of the word "street," and (2.) the meaning of the expression "lay out a street for carriage traffic," as used in s. 7 of the London Building Act, 1894. It is impossible to lay down a definition which will cover every case, but a road may obviously be so private as not to be laid out for carriage traffic within any reasonable interpretation of those words. For the purposes of s. 7 some limitation must be placed upon the definition of "street" in s. 5, which is, when taken literally, wide enough to include an approach to a gentleman's private house. The decisions are conflicting. In *Metropolitan Board of Works* v. *Nathan* (1) there was an approach 100 feet long from a public street leading through a gateway to a block of artizans' dwellings, a portion of which was built over the gateway; there was no public right of way over the approach, which was for the sole use of the tenants; it was held that the approach had not been laid out as a street for foot traffic only within the meaning of the Metropolis Management Acts. In *Daw* v. *London County Council* (2) houses were built upon a building estate, and for the use of the occupiers a road to them was made from a public thoroughfare, at the entrance from which gates, which were kept locked at night, were placed; it was there held that the owner had laid out the road as a street for carriage traffic; this decision, however, is at variance with the previous case and with other cases and should be overruled. In *London County Council* v. *Davis* (3) a passage 200 feet long and twenty feet wide, leading through a gateway to two blocks of artizans' dwellings and not intended for the use of the public, was held not to be "a street for foot traffic only" within the meaning of the Metropolis Management Act, 1882. In *Wood* v. *London County Council* (4) there was a block of flats in the form of a quadrangle com-

(1) (1885) 54 L. T. 423.
(2) 59 L. J. (M.C.) 112.
(3) 64 L. J. (M.C.) 212.
(4) 64 L. J. (M.C.) 276.

municating with the public street by means of an archway, closed by lofty iron gates, the archway and quadrangle being intended for the use of the tenants only, and the general public being entirely excluded; it was there held that the owner had not commenced to form or lay out a street for carriage traffic within the meaning of s. 7 of the London Building Act, 1894, the section under which the present proceedings are taken. The meaning of s. 7, as gathered from its language and from the general current of decisions upon similar sections in cognate statutes, is that it applies to streets which are laid out for carriage traffic and are intended to be used by the public; the section is not satisfied by a user merely for private carriage traffic; and if the contrary was really decided in *Daw* v. *London County Council* (1), that case should be overruled. To satisfy the section a road need not necessarily be a public way, but it must be laid out for traffic of a public character; the traffic must be somewhat in the nature of through traffic, not such traffic as that of tradesmen's carts, which are there by licence for the accommodation of the occupiers. [He also cited *Reg.* v. *Fullford.* (2)]

Avory (*Daldy* with him), for the respondents. The justices were right. The facts shew that the appellant, having been refused the consent of the district surveyor to the laying out of a street which would not communicate with a public carriage-way, endeavoured to evade the operation of the Act by putting up gates at the entrance to his road. The mere fact that the road is not open to the public does not prevent it from being a street for carriage traffic within the meaning of s. 7 of the Act of 1894; the exclusion of the public is not a test of its being a street. Under the Metropolis Management Acts the expression "new street" was held not to be confined to streets which were dedicated to the public: *Islington Vestry* v. *Barrett* (3); and if it is not necessary that a street should be public in order to come within the Act, there can be no reason why the traffic should be public. There is in general no distinction between a public street and a street open for public traffic, a distinction which only exists in cases where a road is closed once a year to

(1) 59 L. J. (M.C.) 112. (2) (1864) 33 L. J. (M.C.) 122.
(3) (1874) L. R. 9 Q. B. 278.

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prevent the public from acquiring a right of way. Sect. 9, sub-s. 1, requires a street laid out for "carriage traffic" to be forty feet wide, and that expression is used throughout the Act to distinguish the width of streets. The case is concluded by the definition of "way" in s. 5 of the Act, which includes "any private road, way, or footpath which it is proposed to convert into a highway or to form, lay out, or adapt as a street." The decision in *Wood* v. *London County Council* (1) is wrong, and should be overruled.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Lord Russell of Killowen C.J., Bigham and Darling JJ.) was delivered by

LORD RUSSELL of KILLOWEN C.J. This is an appeal against the decision of magistrates convicting the appellant upon an information charging him with having commenced to form and lay out a street for carriage traffic without having first obtained the sanction of the council pursuant to s. 7 of the London Building Act, 1894. The question was whether the carriageway proposed to be formed by the appellant would, when formed, be a street within the meaning of s. 7, and the magistrates found that it would. The facts are as follows:—

The appellant owns some 3A. 3R. 39P. of land adjoining a public carriageway called the Grove. The Grove communicates by a carriageway fifteen feet wide with the Highgate Road. No public right of way exists over the land of the appellant, and the only access from any public way is from the Grove. There is a private right of way for foot-passengers through a gateway three feet in width in the boundary fence at the back of the land on to a public footpath in Parliament Hill. The appellant had originally applied to the respondents for their sanction to form and lay out a street for carriage traffic on the site in question. It was intended that the street should run from the Grove through the site to, and to communicate with, the footway referred to upon Parliament Hill. As a carriageway it would have been a cul-de-sac. It was intended to be open and without gate or barrier at the Grove end. The respondents refused their sanction because the pro-

(1) 64 L. J. (M.C.) 276.

posed street would not afford direct communication between two streets formed and laid out for carriage traffic. Sect. 9, sub-s. 4, of the Act of 1894 gave to the respondents the right to refuse their sanction in such a case. The appellant then proceeded with the plan now in question without seeking the sanction of the respondents. That plan is described as follows in the case stated by the magistrates, paragraphs 3, 4, and 5. [His Lordship read those paragraphs, and proceeded:—]

It is to be noted that it is not stated that the appellant is under any legal obligation to erect or to maintain the gates or to keep the porter mentioned in paragraph 5. It is to be further noted that, if without the respondents' sanction the appellant can now do what is proposed, the objects intended to be secured by s. 9 will be defeated. Where sanction, as in this case, has been withheld under s. 9, all the owner would have to do, if the appellant is right, would be to resort to such a plan as the present, and thus reach practically the same end by a different route.

It seems desirable, before considering the sections of the Act which apply to this particular case, to notice the general scope of the Act. It involves a large measure of interference with the rights of private owners: they cannot do what they like with their property. They cannot make or even widen streets, except in conformity with the provisions of the Act (Part II.). They must observe certain lines of building frontage (Part III.). They must have a certain specified space at the rear of the domestic buildings they erect (Part V.). The buildings constructed must be built in conformity with certain detailed requirements as to height, thickness of walls, openings, &c. (Part III.). It is clear that this legislation materially interferes with the action of owners in the use and disposition of their property, and it must be assumed that this has been permitted by the Legislature for reasons of public policy affecting the health, safety, and convenience of the public.

The question in this case turns upon the true construction of s. 7, which provides that before any person can commence to form or lay out any street, whether for carriage traffic or for foot traffic, he must obtain the sanction of the respondents.

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Would the way which the appellant has commenced to lay out and form be, when formed, a "street" within the meaning of that section?

Unless the context otherwise requires, the interpretation section (s. 5) shews the wide meaning to be given to the word "street." It means and includes highway, road, bridge, lane, mews, footway, square, court, alley, passage whether thoroughfare or not, and also a part of any of these. No description can be wider. Why, then, is the contemplated way not a street? It is not the less a street because after proceeding straight for a certain distance it is continued inside or around the proposed square, for "square" is expressly mentioned in the interpretation section. It was admitted in argument, and it seems clear, that it is not less a street because it is intended to be used as a private way, for the interpretation in no way so limits "street." If so, it is not less a street because the traffic for which it is intended is limited to what may be called private traffic to and from the houses to be built along its course. Indeed, it is clear from the wording of the interpretation section (s. 5, sub-ss. 3, 5) that the traffic there mentioned includes both public and private traffic, for there is no trace of any intended limitation to the former of these.

No doubt the controlling word in s. 5 is "street." It does not follow that everything enumerated in the interpretation clause is a street for all purposes and in all circumstances within the meaning of the Act. For example, the drive to a private house is not a street, nor an approach by a courtyard to one or two blocks of buildings or houses: see s. 8; nor is a bridge a street unless it is or may be a link in or continuation of a street. There is involved in the idea of "street" the presence of houses or buildings more or less continuous and in greater or less proximity to one another along it: *Reg.* v. *Fullford.* (1) But this description is not complete or exhaustive for the purposes of the Act in question. Sect. 8 (which it is not easy to construe) would seem to treat as the commencement of a street (amongst other things) the mere forming of the foundations of a house in such a manner and position that

(1) 33 L. J. (M.C.) 122.

it *might* become one of three or more houses abutting on or erected beside land on which a street *might thereafter* be formed. But the facts of this case present no difficulty. Taking the broad description of what a street is, as expressed in the judgments in *Reg.* v. *Fullford* (1), we think that what the appellant here began to lay out was a street even within that description.

We have already dealt with the contention that, because it was intended for private and not for general public traffic, the way or road in question was not a street. What remains? The appellant began to lay out and form a road in part straight, intending to build houses or blocks of buildings on each side of that straight part and facing into it, which road ran into a square and formed a boundary of such square, round which again it was intended to build a continuous line of houses facing into the square, the length of the entire road being 600 feet. We are clearly of opinion that in these circumstances the appellant had commenced to form and lay out a street within the meaning of s. 7, and as he did so without having obtained the sanction of the respondents he committed the offence of which he has been convicted. We think that the magistrates would have decided wrongly had they decided differently. The appeal will therefore be dismissed with costs.

We have examined, but do not think it necessary to refer to, the cases cited during the argument. Each case depends on its particular circumstances. It is indeed worth noting that the question of street or no street is uniformly treated in these cases as largely a question of fact. The decisions, except in the case of *Wood* v. *London County Council* (2), uphold the views taken by the magistrate, and in our opinion that case was wrongly decided.

Appeal dismissed.

Solicitors for appellant: *Newman, Paynter & Co.*
Solicitor for respondents: *Blæland.*

(1) 33 L. J. (M.C.) 122.
(2) 64 L. J. (M.C.) 276.

W. J. B.

1900
Jan. 19.

FENNER *v.* BLAKE.

Landlord and Tenant—Surrender by Operation of Law—Determination of Tenancy—Estoppel by Conduct.

The defendant was tenant to the plaintiff from year to year of a Lady Day holding. In December, being desirous of surrendering his tenancy at an earlier date than that for which he could then give a valid notice to quit, he entered into an oral agreement with the plaintiff to surrender at the following Midsummer. On the faith of this agreement the plaintiff, with the defendant's knowledge and assent, sold the premises to a purchaser with the right to possession at Midsummer. At Midsummer the defendant refused to give up possession; whereupon the plaintiff brought ejectment:—

Held, that the action was maintainable upon the grounds: (1.) that the agreement of December, although bad as an agreement to surrender by reason of its not being in writing, as required by the Statute of Frauds, amounted to an acceptance of a new tenancy to end at Midsummer, and that the acceptance of that new tenancy worked a surrender of the old one by operation of law; and (2.) that the defendant by his conduct in allowing the plaintiff to contract an obligation to his purchaser on the faith of the agreement was estopped from disputing that his original tenancy was one which terminated at Midsummer.

Appeal from the county court of Norfolk.

In March, 1895, the defendant became tenant to the plaintiff of certain premises upon an agreement for a three years' tenancy expiring at Lady Day, 1898. Upon the expiry of that term the defendant continued in possession of the premises as tenant from year to year. In December, 1898, he asked the plaintiff to release him from his tenancy, and it was then orally agreed between them that the defendant's tenancy should terminate at Midsummer, 1899, unless in the meantime another tenant were found. With the defendant's assent, a notice board was put up upon the premises stating that they were to let. In February the plaintiff found a purchaser, and, relying upon the defendant's agreement to surrender the premises on June 24, he entered into a contract with the purchaser to sell him the premises and to deliver possession on that date. On June 24 the defendant refused to give up possession. The plaintiff brought ejectment. At the hearing

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it was contended for the defendant that the agreement to surrender the premises in June, not being in writing, was void, and that his tenancy was consequently still subsisting. The county court judge gave judgment for the plaintiff.

The defendant appealed.

T. Willes Chitty, for the appellant. The agreement of December, 1898, was clearly bad as a surrender in fact, for the Statute of Frauds requires surrenders of tenancies of all kinds to be in writing. It is not confined to surrenders of terms created by agreement in writing, but applies equally to tenancies from year to year created by parol or by implication: *Taylor* v. *Chapman* (1); *Mollett* v. *Brayne*. (2) Nor did the plaintiff's acceptance of the defendant's offer to quit operate as a surrender by operation of law: *Johnstone* v. *Hudlestone*. (3) And it makes no difference that the plaintiff on the faith of it sold the premises to a third person. A parol agreement by a tenant from year to year to surrender, followed by a lease or sale to a third person with the tenant's assent, will amount to a surrender by operation of law if the tenant gives up possession: *Phené* v. *Popplewell* (4); otherwise not: *Lyon* v. *Reed* (5); *Wallis* v. *Hands*. (6) Here the tenant did not give up possession.

H. Dobb, for the respondent. Any dealing with the property by the landlord with the tenant's assent will, if inconsistent with the continuance of the tenancy, create a surrender by operation of law. The landlord having altered his position upon the faith of the agreement to surrender, the tenant is estopped from disputing that his tenancy was terminable in June.

Chitty, in reply.

CHANNELL J. In this case I am of opinion that the judgment of the county court judge must be affirmed. There

(1) (1795) 2 Peake, 19; 4 R. R. 884.
(2) (1809) 2 Camp. 103; 11 R. R. 676.
(3) (1825) 4 B. & C. 922; 28 R. R. 505.
(4) (1862) 12 C. B. (N.S.) 334.
(5) (1844) 13 M. & W. 285.
(6) [1893] 2 Ch. 75.

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Channell J.

appear to me to be two grounds upon which the plaintiff is entitled to succeed.

The defendant was a tenant who had an ordinary tenancy from year to year terminable by notice in March. In December, 1898, the defendant, being desirous of getting rid of his tenancy and not having given notice to quit in the following March, had a meeting with his landlord, the plaintiff, when they mutually agreed by parol that the tenancy should be determined in the following June. The question is, What is the effect of that agreement? It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law. And if an agreement as to an alteration of the rent may be made by parol, why may not equally an agreement as to an alteration of the date at which the tenancy is to be determinable? It seems to me that the effect of the agreement in December was that the defendant accepted a new tenancy for six months terminable in June in lieu of the existing tenancy. And if so, then all the authorities agree that the acceptance of a new tenancy works a surrender of the old tenancy by operation of law. On that ground I am of opinion that the plaintiff was entitled to maintain his action.

But there is also another ground which I think is equally applicable, and which I think is not displaced by *Lyon* v. *Reed* (1), one of the cases on which Mr. Chitty relied. It seems to me that in this case the facts raise an ordinary case of estoppel. The defendant, having agreed to give up possession of the premises in June, assented to the landlord selling the premises with a right of the purchaser to possession in June. The landlord accordingly sold to a purchaser with a right to possession at that date, and thereby rendered himself liable to an action at the suit of the purchaser if he was unable to

(1) 13 M. & W. 285.

give him possession at that date. Under those circumstances it seems clear that the tenant is estopped from saying that his tenancy, whatever it was in fact, was not a tenancy ending in June. It is an invariable practice, when a reversion is put up to auction, for the vendor to state what the terms of the tenancy are and when it expires; and if the tenant is communicated with before the sale and agrees that his tenancy is of such and such a character, and thereupon it is so described, and the sale takes place upon that footing, it is impossible to say that the tenant is not estopped from saying that the tenancy is other than that upon the footing of which he allowed the property to be sold to the purchaser. On this ground of estoppel also I think that the judgment of the county court judge may be supported.

BUCKNILL J. I am of the same opinion. The effect of the evidence stated in the judge's notes seems to be this—that the defendant asked to be released from his tenancy, and the landlord consented, and they then and there agreed that there should be a new tenancy for six months terminating in June. If that is the effect of it, then the acceptance of the new tenancy amounted to a surrender by operation of law. I also entirely agree with what my brother Channell has said upon the point as to estoppel. Upon both those grounds I think the judgment of the county court judge was right. The appeal must, therefore, be dismissed.

Appeal dismissed.
Leave to appeal refused.

Solicitors for appellant: *Torr, Gribble, Oddie & Co., for Danby, Palmer & Blake, Great Yarmouth.*
Solicitors for respondent: *Howard & Fenner.*

J. F. C.

1900
Feb. 1.

KEMBLE, Plaintiff *v.* ADDISON, Defendant. SPOONER, Claimant.

Bill of Sale—Registration—Validity—Non-description of Occupation—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

In a bill of sale given by a married woman living apart from her husband, and in the affidavit filed on registration, she was simply described as a married woman, no occupation being given. She was in fact employed as manager in a dressmaking business at a weekly salary :—

Held, that the registration of the bill was invalid, since her occupation ought to have been described.

Appeal from the Westminster County Court.

The plaintiff Kemble, having got judgment against the defendant, seized in execution certain goods and chattels at her residence which were claimed by the claimant under a bill of sale.

At the trial of the interpleader issue in the county court it was contended that the registration of the bill of sale was bad, on the ground that the affidavit did not properly describe the occupation of the defendant.

It appeared that the defendant was a married woman living apart from her husband. The judgment debt was incurred in May, 1899. On August 5, 1899, the defendant, who was then residing at 3, Cork Street, executed the bill of sale in favour of the claimant. At that time she was in employment at a dressmaker's at Kensington at a weekly salary as manager. In the bill of sale she was described as "Dorothy Addison, the wife of Robert Addison, of 3, Cork Street," and in the affidavit filed on registration of the bill of sale it was stated: "The said Dorothy Addison resides at 3, Cork Street and is a married woman."

The county court judge held the bill of sale good, and gave judgment for the claimant. The plaintiff appealed.

Macaskie, for the appellant. The defendant at the time she gave the bill of sale was employed at a salary as manager in a

milliner's business. That, therefore, was her occupation, and as it was not set out in the affidavit there was a failure to comply with s. 10, sub-s. 2, of the Bills of Sale Act, 1878, which requires that with a true copy of every bill of sale there shall be filed "an affidavit of the time of such bill of sale being made or given and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same." [He cited *Luckin* v. *Hamlyn* (1); *Allen* v. *Thompson* (2); *Adams* v. *Graham* (3); *Downs* v. *Salmon* (4); *Feast* v. *Robinson* (5); *Usher* v. *Martin*. (6)]

Biron, for the respondent. The requirements of the Act were sufficiently complied with. All that is necessary is that there should be such a description of the person granting the bill of sale as will be reasonably sufficient to enable him or her to be identified: *Throssell* v. *Marsh* (7); *Phillips* v. *Burt* (8); *Bath* v. *Sutton*. (9)

CHANNELL J. In this case I cannot say that the point raised is free from difficulty, but I have come to the conclusion that we must allow the appeal, and say that this bill of sale was bad in that the affidavit did not properly describe the occupation of the grantor. It seems to me that the decisions clearly shew that the occupation of the grantor, if he or she has an occupation, must be described. In *Feast* v. *Robinson* (5) Romer J., adopting the language of Martin B. in *Luckin* v. *Hamlyn* (1), said (10): "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is that such a description shall be given that if inquiry be made in the place where the person resides he may be easily identified." That seems to me a very proper test to apply, and adopting that test in this case we are met with another difficulty in the words "to the knowledge of his neighbours"; and the question arises, Who

(1) (1869) 21 L. T. 366.
(2) (1856) 25 L. J. (Ex.) 249.
(3) (1864) 33 L. J. (Q.B.) 71.
(4) (1888) 20 Q. B. D. 775.
(5) (1894) 63 L. J. (Ch.) 321.
(6) (1889) 61 L. T. 778.
(7) (1885) 53 L. T. 321.
(8) (1862) 2 F. & F. 862.
(9) (1858) 27 L. J. (Ex.) 388.
(10) 63 L. J. (Ch.) at p. 323.

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were the grantor's neighbours? In *Feast* v. *Robinson* (1) the grantor of the bill of sale had in fact more than one business in which he was interested, but he did not occupy himself with any of them. He lived as a country gentleman, amusing himself with country pursuits, but he was known to the creditors of these different businesses as being in reality the only monied man in those businesses. The bill of sale was given over his goods at his country residence, and, as far as those who were his neighbours in the country knew, the description of his occupation as given in the bill of sale, "gentleman of no occupation," was perfectly correct. He would be better identified by that description by those among whom he resided than if he had been described as occupied in various specified businesses. It was held in that case that the description satisfied the requirements of the Bills of Sale Act. Now, in the present case the grantor of the bill of sale was in fact occupying herself by attending daily at a milliner's establishment as a manager and for a weekly salary. No doubt she was residing at Cork Street, and her neighbours there may not have known that she was employed and had an occupation at this milliner's in Kensington; but they must have known that she had some occupation which took her away from home daily during business hours; and can it be doubted that she had an occupation within the meaning of the term as used in the Act, and that that occupation was that of a milliner? Possibly, if such an occupation was merely a temporary one, it might not be necessary to give it in the affidavit. If, for instance, the occupation which she had when the bill of sale was executed had only recently commenced and would terminate in a week or ten days, it would, I think, be unnecessary and even misleading to describe it. But that is not the case here. There is no evidence whatever that the occupation was merely temporary. I think, therefore, that this lady had an actual occupation at the time she granted this bill of sale, and that as that occupation was not described the requirements of the statute have not been complied with and this appeal must be allowed.

(1) 63 L. J. (Ch.) 321.

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BUCKNILL J. I am of the same opinion, and will only add a very few words. It seems to me that each case of the kind must turn very largely on its own particular circumstances, and in this case the Court must decide whether there has been a reasonable compliance with the requirements of the Act of Parliament. It is not necessary, I think, that there should be the most absolute and literal compliance with the provisions of the Act as to the description of the grantor of a bill of sale, but there must be sufficient to afford a guide to those who are desirous of making inquiries for their own protection whether certain persons have given a bill of sale. There must be sufficient to enable such persons to identify the grantor of the bill of sale.

Now, on the facts of this case the grantor, who was residing in Cork Street, but was engaged all day in earning a salary as manager at a milliner's establishment in Kensington, is described merely as "married woman." In my opinion that is insufficient. She had an occupation to which she went daily, and that occupation ought to have been stated. I agree, therefore, that the provisions of the Act have not been complied with, and that the bill of sale is therefore bad.

Appeal allowed.

Solicitor for appellant: *James Hall.*

Solicitor for respondent: *F. Hastings Dauney.*

A. P. P. K.

1900
Jan. 31.

HENDERSON *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL.

Solicitor—Costs—Solicitor Employed at fixed Annual Salary—Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

A public body employed a solicitor as their clerk at a fixed annual salary, for which (inter alia) he was to prosecute and defend all legal proceedings taken by or against them. Out of pocket expenses were to be paid for by them. In an action brought against them, judgment was entered for them with costs, to be taxed as between solicitor and client. On taxation the registrar struck out all items, except out of pocket expenses paid by the solicitor, on the ground that all work done by him in the conduct of the action was covered by his salary :—

Held, that the taxation was wrong, and ought to be reviewed.

APPEAL from the county court of Glamorganshire.

On March 16, 1898, the Merthyr Tydfil Urban District Council appointed a clerk, a qualified solicitor, whom they required to devote the whole of his time to the duties of his office. He was not allowed to be interested in any other business or profession, and had to perform all the duties of his department, legal, parliamentary, and otherwise, for a salary of 400*l.* per annum. Out of pocket expenses were to be paid for by the council. Among his duties, as specified by the agreement, he was to prosecute or defend all legal proceedings taken by or against the council.

In 1899 an action was brought in the county court by one Henderson against the district council, in which judgment was entered for the district council with costs, to be taxed as between solicitor and client.

On taxation of the defendants' costs, the registrar of the county court disallowed every item, except actual out of pocket expenses, on the ground that, as these would be all that the district council would have to pay to the solicitor, they could not recover any more under the order for costs by virtue of s. 5 of the Solicitors Act, 1870. The district council applied

to the county court judge to review the taxation. He declined to do so, but gave leave to appeal.

R. V. Bankes (*E. Lewis Thomas* with him), for the appellants. The taxation was wrong, and must be reviewed. Sects. 4 and 5 of the Solicitors Act of 1870 (1) do not relate to such an agreement as there was here. Those sections refer to an agreement by a client with a solicitor that the solicitor should be paid a lump sum in lieu of fees in some particular matter or litigation, and do not affect an agreement by which a solicitor undertakes to act as clerk to a public body at a fixed salary.

The decision of Page Wood V.-C. in *Galloway* v. *Corporation of London* (2) is in the appellants' favour.

John Sankey, for the respondent. The registrar was right. Costs are an indemnity, and are given to the person who receives them to indemnify him for the costs of the proceedings in which he has been involved by the conduct of the opposite party. The effect of this action was to compel the council to pay certain sums, such as counsel's fees, which they have to pay to their clerk and solicitor as out of pocket expenses; but they have to pay the salary of 400*l.* a year quite apart from this action, and from any work done by the solicitor in it. The profit costs of the solicitor are all included by the terms of his appointment in his salary, and, therefore, by s. 5 of the Solicitors Act, 1870, the council cannot recover from the person ordered to pay costs more than the amount which they will

(1) By the Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, &c." . . . .

By s. 5, "Such an agreement shall not affect the amount of or any rights or remedies for the recovery of any costs recoverable from the client by any other person or payable to the client by any other person. . . . . Provided always that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same."

(2) (1867) L. R. 4 Eq. 90.

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have to pay their solicitor—that is to say, the out of pocket expenses.

CHANNELL J. I think that this appeal must be allowed. I hope to be able to make clear the grounds on which I come to this conclusion, and to shew what alone could have been done on this taxation. The district council have a quantity of work which must be done by a solicitor, some of it being litigious and some non-litigious work. They accordingly engaged as their clerk a solicitor, who was to devote the whole of his time to the duties of his office, and was to be paid a yearly salary of 400*l.*, in addition, of course, to being reimbursed for any disbursements he might have to make on behalf of the council. They paid him, therefore, 400*l.* a year for his services, both in litigation and in all other ways. It is urged that, when they are successful in an action and get costs, they are only entitled to an indemnity. That is, no doubt, true. By s. 5 of the Solicitors Act, 1870, it is provided that where there is an agreement between a solicitor and his client for paying a lump sum in respect of the whole of the solicitor's services (which is legalised by s. 4 of the same Act) the client "shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same." The registrar of the county court has applied that provision to the facts of the present case, and we also have to apply it. It is a provision easy to apply where the agreement relates only to the work in the bill which is being taxed, but not easy to apply when the agreement relates both to that and to other work. The registrar on taxing the bill of costs finds that the sum of 11*l.* 12*s.* 7*d.* was charged by the solicitor for work done by him, and he, therefore, strikes that off on the ground that that work was paid for by the client—the urban district council—by the annual salary of 400*l.* He holds that the only amount which the urban district council would have to pay to the solicitor in consequence of the action would be the solicitor's

out of pocket expenses, which he accordingly allows. Now, the question for us is whether the registrar was right. No doubt the sum of 400*l.* per annum was paid to the solicitor in respect both of the litigious and the non-litigious work done by the solicitor for the district council. A certain proportion of the 400*l.*—it is quite impossible to say how much—was, therefore, paid in respect of this particular work which was done by the solicitor in this action. It is for the party objecting to the allowance of the usual costs under such circumstances to shew that the allowance will give more than an indemnity, and in all ordinary cases, such as the present, it is impossible for him to shew it. In some cases, however, he might be able to do so.

Suppose for a moment that the litigation had been very heavy and expensive, that the case had gone to the House of Lords and so forth, and that the solicitor's profit costs had been 500*l.* Then it would be plain that, as the total sum paid by the district council to the solicitor was 400*l.* per annum, they were not paying him the 500*l.*, and therefore could not recover it, and the costs which the opposite party would have to pay would be diminished in proportion. Here, however, the registrar was wrong in disallowing the whole of the solicitor's profit costs. A certain part of the salary of 400*l.* was paid by the district council in respect of them, and that portion ought to have been allowed and paid by the opposite party. It must be assumed until the contrary is shewn that 400*l.* is a proper sum to be paid to the solicitor for his whole year's work, and also that 11*l.* 12*s.* 7*d.* was a proper sum to be paid to him for this part of his work. The district council must, therefore, be presumed to be paying their solicitor 11*l.* 12*s.* 7*d.* out of the 400*l.* for this very work. It seems to me that the registrar was clearly wrong in disallowing the whole of the amount charged by the solicitor in respect of work done by him, and, further, that unless something could be shewn which it is most improbable in this case can be shewn, the whole ought to have been allowed, and, therefore, I think that there must be a review of the taxation. Cases such as this arise frequently, and I believe that they are

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always dealt with in the High Court in the way I have mentioned.

BUCKNILL J. I agree.

Appeal allowed.

Solicitors for appellants: *Morgan & Upjohn, for John Vaughan, Merthyr Tydfil.*

Solicitor for respondent: *H. P. Becher, for F. Sydney Simons, Merthyr Tydfil.*

A. P. P. K.

1900
Jan. 31.

THE QUEEN *v.* JUSTICES OF LONDON. *Ex parte* THE GUARDIANS OF THE POOR OF GREENWICH.

*Practice—Appeal to Quarter Sessions—Order for Maintenance—*43 *Eliz. c.* 2*—Order to pay* 2*s.* 6*d. a Week—Sum adjudged to be paid more than* 3*l.—Metropolitan Police Court Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 50.

An order of a metropolitan police magistrate to pay 2*s.* 6*d.* weekly towards the relief and maintenance of a certain pauper for and during so long a time as she shall be chargeable is not an order in which the sum adjudged to be paid is more than 3*l.*, so as to give a right of appeal to quarter sessions under s. 50 of 2 & 3 Vict. c. 71.

RULE NISI for a certiorari to bring up and quash an order of the court of quarter sessions for South London.

On May 4, 1899, the metropolitan police magistrate sitting at Greenwich Police Court, on the application of one H. S. Campbell, on behalf of the guardians of the poor of the Greenwich Union, made the following order: "H. S. Campbell, on behalf of the guardians of the poor of the Greenwich Union, in the said district, having made a complaint that one Mary Anne Grist is an old and impotent person, and not able to work or maintain herself, and is now chargeable to the said union, and that one J. Grist, hereinafter called the defendant, is the son of the said Mary Anne Grist, and is of sufficient ability to relieve and maintain his said mother: on hearing the said complaint, it is adjudged and determined that the said Mary Anne Grist is

poor and unable to work so as to support and maintain herself, and that she is actually chargeable to the said union, and that the said defendant is of sufficient ability to relieve and maintain his said mother; and it being now proved that the said defendant dwells within the jurisdiction of this court, it is ordered that the defendant shall upon notice of this order pay to the guardians of the said union through their collector weekly from this time present the sum of two shillings and sixpence for and towards the relief and maintenance of the said Mary Anne Grist for and during so long a time as she is poor and unable to work so as to relieve and maintain herself and shall be chargeable to the said union, or until the defendant shall be lawfully ordered to the contrary."

It was subsequently discovered that J. Grist was not the legitimate son of Mary Anne Grist, and, on this being brought to the notice of the guardians, they stated that they should not take any further action under the order.

J. Grist, however, appealed to quarter sessions against the order, and, as the guardians did not appear at the appeal, the order was set aside with costs.

The guardians then obtained this rule nisi for a certiorari to bring up and quash the order of the court of quarter sessions, on the ground that that court had no jurisdiction to deal with the order of the magistrate.

W. M. Thompson shewed cause against the rule. The court of quarter sessions had jurisdiction to entertain the appeal. The proceedings were taken under 43 Eliz. c. 2, which, by s. 6, gives a right of appeal to quarter sessions from any act done by justices of the peace. Similar powers of appeal are given by the Summary Jurisdiction Act of 1879, and in the metropolitan district there is, by 2 & 3 Vict. c. 71, s. 50, a right of appeal to quarter sessions from any order of a metropolitan police magistrate by which a sum of more than 3*l.* is adjudged to be paid. An order to pay 2*s.* 6*d.* weekly for an indefinite period is an order to pay a sum which will probably be more than 3*l.*, and, therefore, an appeal lies against such an order.

Travers Humphreys, in support of the rule. There is no

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power to appeal to quarter sessions from such an order as this. By the statute of Elizabeth such an order could only be made in quarter sessions, and it is, therefore, plain that s. 5 did not give a right to appeal to quarter sessions in such a case. The Summary Jurisdiction Acts only give a right of appeal to quarter sessions where there has been a conviction followed by imprisonment. As to 2 & 3 Vict. c. 71, this is not an order for the payment of a sum more than 3*l.*, but only an order to pay 2*s.* 6*d.* a week so long as a certain person is chargeable. That person might die or cease to be chargeable at any time before more than one or two weeks had been paid.

CHANNELL J. In this case I am of opinion that the rule must be made absolute. It is clear that under ordinary circumstances no appeal lies to quarter sessions against an order of justices in petty sessions adjudging that a person should contribute to the support of a person who has become chargeable to a union. Originally by the statute of Elizabeth the power to make such an order was given, not to justices in petty sessions, but to justices in quarter sessions. It is true that that Act also gave power to appeal to quarter sessions against any act done by justices of the peace, but the meaning of that was that there was power to appeal against any act done by justices out of quarter sessions. It is doubtful how far even that power still exists, since, as was pointed out in the case of *Reg.* v. *Justices of London* (1), although the statute of Elizabeth remains unrepealed and is the foundation of the law of rating, its general provisions have been superseded (2) by the particular provisions of subsequent legislation. Subsequent Acts of Parliament have enacted a code of procedure with regard to appeals which have been substituted for the general provisions of the earlier Act, and it is to that code that we must look, and not to the more general enactment, to regulate the mode of appeal. That code, therefore, indirectly repeals by substitution the provisions as to appeal given by the statute of

(1) [1899] 1 Q. B. 532.

(2) The word "suspended" in [1899] 1 Q. B. 537, line 22, should, as pointed out in the Errata to that volume, read "superseded."

Elizabeth. But it is clear that no appeal to quarter sessions from such an order as was made in this case was given by the Act of Elizabeth, since by that Act the only authority having power to make such an order was the court of quarter sessions itself. Then came the Act of 1819, which gave a concurrent jurisdiction to petty sessions, enabling them as well as quarter sessions to make such orders. No right of appeal from their decision was however given by that Act, nor have any of the subsequent Acts dealing with the subject given a right of appeal to quarter sessions from this order when made at petty sessions. The right of appeal is a statutory right, and there is no statute giving such a right. It was suggested that it was given by the Summary Jurisdiction Acts. If the order of the magistrate had been disobeyed and an order for imprisonment had issued, I do not say that those Acts would not have given a right of appeal to quarter sessions. That is, however, not the case here, and I do not think that the Summary Jurisdiction Acts give any right of appeal from such an order as that now before us. The only remaining point is the suggestion that a right to appeal to quarter sessions in such a case is given in the metropolitan district by virtue of s. 50 of the Metropolitan Police Court Act, 1839 (2 & 3 Vict. c. 71), which says: "In every case of summary order or conviction before any of the said magistrates in which the sum or penalty adjudged to be paid shall be more than three pounds . . . . any person who shall think himself aggrieved by the order or conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace to be holden for the county wherein the cause of complaint shall have arisen." This order is to pay a sum weekly which may or may not amount in process of time to a sum more than 3*l.*, and it is contended that it is, therefore, an order to pay a sum more than 3*l.*, and that an appeal will lie under this section. The amount which may have to be paid under the order is perfectly uncertain, and would depend on the life of the person for whose support it was to be paid, and on her power of maintaining herself, and on a variety of circumstances. It is quite possible that in a week's time she might be able to support herself and so be no longer chargeable. I do not see how it

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is possible to say that such an order is an order to pay a sum more than 3*l.* I think, therefore, that the section does not give any right to appeal in such a case. In the result, therefore, I am of opinion that the order of the court of quarter sessions was made without jurisdiction and that it must be quashed.

BUCKNILL J. I concur.

Solicitors for applicants: *Saw & Son.*
Solicitors for respondent: *Foy & Co.*

A. P. P. K.

Applied. *Re* D'AVIGDOR-GOLDSMID'S LIFE POLICY. [1951] 2 All E.R. 543.

Followed. *In re* D'AVIGDOR-GOLDSMID [1951] Ch. 1038

1899

Dec. 11.

THE ATTORNEY-GENERAL *v.* DOBREE AND ANOTHER.

Revenue—Estate Duty—Policy of Life Insurance—Settled Property—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 3.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which "passes on the death" of a person dying after the commencement of the Act. By s. 2, "property passing on the death" shall be deemed to include (sub-s. 1 (*d*)) any annuity or other interest purchased or provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. Sect. 3 exempts from estate duty property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.

A., shortly before his marriage, effected a policy of insurance on his own life for a sum payable on his own death to his intended wife, and assigned the policy to the trustees of a settlement made in consideration of the marriage. By that settlement the principal moneys to be received under the policy were to be held by the trustees in trust for the wife for life and upon other trusts, and A. covenanted to keep up the policy and pay the premiums thereon during his life. He duly performed his covenant, and died after the commencement of the Act, leaving his wife surviving:—

Held, that the sum payable under the policy on A.'s death was an "interest purchased or provided by the deceased" within the meaning of s. 2, sub-s. 1 (*d*); that the exemption from duty contained in s. 3 did not apply; and, therefore, that on A.'s death estate duty was payable in respect of that sum.

INFORMATION by the Attorney-General claiming estate duty on behalf of the Crown.

The following facts were stated in the information :—

1. In September, 1866, a marriage was duly solemnized between Falconer John Atlee and Mary Dobree MacCall. Shortly before that marriage Falconer John Atlee effected a policy of assurance in La Nationale Insurance Office of France dated September 25, 1866, for the sum of 37,537 francs (or 1501*l.* 10*s.*) on his own life, and payable on his death to Mary Dobree MacCall, subject to a yearly premium of 50*l.* payable by him during his life.

2. By an indenture dated September 19, 1867, Falconer John Atlee assigned the policy to four persons, of whom the two defendants are the survivors, as trustees for the purposes of an indenture of settlement of September 20, 1867, whereby, in pursuance of an agreement made previous to his marriage to Mary Dobree MacCall, Falconer John Atlee assigned the policy of assurance to four trustees (including the two defendants) upon the trusts thereinafter declared concerning the same.

3. By that settlement Falconer John Atlee covenanted with the trustees to keep up the policy and pay the premiums thereon during his life; and he did in fact duly keep up the same, and all premiums thereon were paid by him, and the moneys payable under the policy at his death were duly received by the defendants as the surviving trustees of the settlement of September 20, 1867.

4. It was declared by that settlement that the moneys to be received under the policy should be held by the trustees upon trust for Mary Dobree Atlee for life. The settlement contained a joint power of appointment by Falconer John Atlee and Mary Dobree Atlee in favour of their children over the trust funds, including the proceeds of the policy. By a joint appointment, dated January 30, 1871, Falconer John Atlee and Mary Dobree Atlee appointed that part of the trust funds (including the proceeds of the policy) should be held in trust for their son George Gordon Falconer Atlee, subject to the life interest of his mother.

5. Falconer John Atlee died on October 2, 1894, leaving Mary Dobree Atlee him surviving.

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The facts stated in the information were not disputed by the defendants.

The information alleged that, under the above circumstances, estate duty had become payable under s. 2, sub-s. 1 (*d*) (or if not, then under the other provisions of ss. 1 and 2), of the Finance Act, 1894 (57 & 58 Vict. c. 30), in respect of the moneys received under the policy as property passing on the death of Falconer John Atlee within the meaning of those sections, and that the defendants, upon application made on behalf of the Commissioners of Inland Revenue, had refused to pay the duty, and contended that it was not payable. The information prayed for a declaration that on Falconer John Atlee's death estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value, to be ascertained as provided by the Act, of all moneys received in respect of the policy of assurance on his life, as property passing on his death within the meaning of the Act; and for an account, &c. (if necessary).

Sir Richard Webster, A.-G., and *Sir Robert Finlay, S.-G.* (*Vaughan Hawkins* with them), for the Crown. The sum payable under the policy at Mr. Atlee's death is property which is covered by ss. 1 and 2 of the Finance Act, 1894. It is property which, under the words of s. 2, "shall be deemed" to be property passing at the death, and therefore is brought within the operation of s. 1. (1) It is within sub-s. 1 (*c*) of

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30):—

Sect. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . .

"(*c*) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real pro-

s. 2, being property which would be required on the death to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889. (1) By s. 11 policies of insurance

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perty as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; and

"(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

(1) The Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12):—

Sect. 38: "(1.) Stamp duties .... shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof.

"(2.) The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased.

"(*c*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

The Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7):—

Sect. 11: "(1.) Sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows:—

"The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise ....:

"The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,'

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ance are expressly included in the property to be charged under s. 38 of the Act of 1881, and the elimination of the words "voluntary," "voluntarily," and "volunteer" in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, has the effect of rendering the policy moneys in the present case chargeable to estate duty. Mrs. Atlee is a "donee" within the meaning of s. 11 of the Act of 1889. The only exemption from account duty is in respect of transfers of property for valuable consideration. Sect. 2, sub-s. 1 (*c*), of the Finance Act, 1894, covers all family, marriage, and other settlements where there has been no purchase of the interest.

Further, estate duty is clearly chargeable under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894. On her husband's death Mrs. Atlee had a beneficial interest in the policy moneys, and that interest was purchased or provided by the deceased, and accrued to her on his death. The exemption from estate duty with respect to cases within s. 2, sub-s. 1 (*d*), is contained in s. 15 (1), the only exemption from the duty which would otherwise be payable being in respect of a single annuity not exceeding 25*l*. It is clear, therefore, that there is no exemption in respect of "other interests purchased or provided by the deceased."

Haldane, Q.C. (*Danckwerts* with him), for the defendants. The defendants are not chargeable with estate duty in respect of the moneys payable under the policy on Mr. Atlee's death.

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wherever the same occurs, included the proceeds of sale thereof:

"The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June one thousand eight hundred and eighty-nine, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

(1) 57 & 58 Vict. c. 30, s. 15, sub-s. 1: "Estate duty shall not be payable in respect of a single annuity not exceeding twenty-five pounds purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person; and if in any case there is more than one such annuity, the annuity first granted shall be alone entitled to the exemption under this section."

Sect. 1 of the Finance Act, 1894, does not apply. The property did not pass by reason of the death, but by reason of the contract made with the insurance company. It passed by their disposition, not by the disposition of the deceased. That view was taken by the House of Lords in *Lord Advocate* v. *Fleming*. (1) The decision there was on s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), which charged succession duty on "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act." Sect. 1 of the Finance Act, 1894, deals with property passing; s. 2 with certain interests which "shall be deemed" to pass. The two sections are distinct and mutually exclusive. If a case falls within s. 2 it cannot come within s. 1: *Earl Cowley* v. *Inland Revenue Commissioners* (2), judgment of Lord Macnaghten. It is, at any rate, doubtful whether this case falls within s. 2. It is certainly not within sub-s. 1 (*c*), because neither the husband nor the wife were "donees." The meaning of that word is not altered by sub-s. 1 (*c*). The assignment by the deceased was for good consideration—namely, marriage. The settlement was in no sense a voluntary settlement, and the word "donee" refers to a person taking a gift without consideration. It is also submitted that the case does not fall within sub-s. 1 (*d*). No beneficial interest passed from the deceased to the wife or her trustees on his death. No beneficial interest accrued or arose on his death; it arose or accrued on the making of the settlement. But, assuming that the policy moneys come within the terms of s. 2, sub-s. 1 (*d*), they are exempted from duty by s. 3. (3) The property taken by Mrs.

(1) [1897] A. C. 145.

(2) [1899] A. C. 198, at pp. 212, 213.

(3) 57 & 58 Vict. c. 30, s. 3: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee."

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Atlee, or the trustees, is "property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes." The deceased bonâ fide purchased the policy moneys from the insurance company, the price being the premiums which he paid during his lifetime. The disposition on his death was the disposition of the company; at the time of his death he had no interest whatsoever in that which passed at his death.

Sir R. Webster, A.-G., in reply. Sect. 3 refers to purchases from the person who makes the disposition, and it clearly was made by the deceased here. Whether or not the policy moneys are dutiable, in the present case, under s. 2, sub-s. 1 (*c*), that clause throws light on the meaning of clause (*d*). Reading clauses (*c*), (*d*), and s. 15 together, it is clear that clause (*d*) applies, and renders the defendants liable to pay estate duty.

DARLING J. I am of opinion that our judgment should be for the Crown. [The learned judge stated the facts.] Under these circumstances the Crown allege that estate duty is payable in respect of what Mrs. Atlee received under the policy owing to the death of her husband. It is said that the case comes within the Finance Act, 1894, s. 2, sub-s. 1 (*d*). It provides: "Property passing on the death of the deceased shall be deemed to include the property following . . . . (*d*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." Omitting words which cannot apply, one has to consider whether what Mrs. Atlee got, or what the trustees got, upon the death of Mr. Atlee can properly be described as "any interest purchased or provided by the deceased . . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." It was contended by counsel for the defendants that no beneficial interest passed upon Mr. Atlee's death; that all the interest he ever had was in the hands of trustees by virtue of the earlier settlement, and that what passed to Mrs. Atlee upon his death,

though it was a benefit or advantage, was not within the words "beneficial interest accruing or arising by survivorship or otherwise" on his death, and therefore is not taxable. It is material, I think, in order to see what exactly is meant by sub-s. 1 (*d*), to look at s. 15 of the Act. In (*d*) not only interests but annuities are dealt with, and s. 15 enacts: "Estate duty shall not be payable in respect of a single annuity not exceeding 25*l.* purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person." Now the sum in question here is not an annuity, and the exemption in s. 15 is only in respect of an annuity of a value not exceeding 25*l.* Supposing in this case every circumstance had been the same except that the amount payable by the insurance company upon Mr. Atlee's death had been calculated, not as a lump sum, but had been calculated, as it perfectly well might have been, so as to give her an annuity during her life. If that were so, there would be no difference between that case and this, except that an annuity had been stipulated for instead of a lump sum. All the other words being the same, what is there to shew that s. 2, sub-s. 1 (*d*), does not apply if an annuity has not been stipulated for but a lump sum? I can see nothing. I think that s. 15 shews that exactly what was done in the present case does result in a taxable beneficial interest arising upon the death of the person who has insured his life for the benefit of his widow as Mr. Atlee did, and that such a taxable beneficial interest would certainly have attached if the money to be paid by the insurance company had been secured to be paid in the way of an annuity, provided that the annuity had not been within the exemption of s. 15 because its value did not exceed 25*l.* It was further contended by counsel for the defendants that the sum to be paid by the insurance company is taken out of the operation of s. 2, sub-s. 1 (*d*), by virtue of s. 3, which provides: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property

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passes." I do not think that provision applies. It seems to me to be aimed at something entirely different from what has happened here. I think it is aimed at the kind of case where a person has bought something and paid for it a price—"a consideration in money or money's worth"—but is not to get the benefit of his purchase until the death of his vendor. It is clear, then, that he gets no immediate benefit at all; he has bought and paid for something the delivery of which to him is postponed. In such a case the Legislature has recognised that it would be unjust to make him pay duty upon the death of his vendor when he has paid the full value of the interest to the vendor—it may be years and years ago. I do not think that s. 3 was intended to include such a transaction as the one before us. I think that the property here is not "property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes." It seems to me that the argument for the defendants —that s. 3 applies to this case—involves reading the word "from" in that section as though it were "by." I cannot think that s. 3 was ever intended to have such an operation. For these reasons, I am of opinion that the Crown is entitled to succeed.

CHANNELL J. I am of the same opinion. I think that the duty claimed by the Crown is given by s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and that, under the facts of this particular case, s. 3 of the same Act does not prevent the duty from becoming due. To my mind there is a little difficulty in fully following the exact literal words of Lord Macnaghten's judgment in *Earl Cowley* v. *Inland Revenue Commissioners* (1) with respect to cases falling within ss. 1 and 2. It is quite true that if you can arrive at the conclusion that the case falls within s. 1, then s. 2 may be said to be excluded—you do not want s. 2. But one of the operations of s. 2 seems to me clearly to be to sweep into s. 1 some cases which might be doubtful upon the construction of s. 1, but which s. 2 includes in clear words, and therefore brings them in to be subject to the duty,

(1) [1899] A. C. 198.

whether they were within s. 1 on the true interpretation of it, or not. I think that Lord Macnaghten must have meant that in such cases, if you took the trouble to decide whether they were within s. 1 or not, and came to the conclusion that they were, then you would not want s. 2. At any rate, it was not necessary for him in the case before him to express an opinion contrary to what I have said. In the present case one difficulty is whether or not any policy of insurance comes within s. 1 of the Finance Act, 1894. That difficulty arises from the fact that upon the death the property becomes more or less changed. The person insured has a policy which carries with it a right for somebody to receive upon the death of the assured a certain sum of money. Upon that condition of things two doubts may arise: first, whether the case is within s. 1 at all, and secondly, if it is, whether what is supposed to pass and be subject to the duty is the value which the deceased had in the policy, which means, I suppose, the surrender value of the policy, or the principal value of the money payable upon the death. Now I think that s. 2, by incorporating s. 11 of the Customs and Inland Revenue Act, 1889, contains a distinct provision in reference to policies of insurance. Sect. 11 expressly deals with policies of insurance. It is an amendment of s. 38 of the Customs and Inland Revenue Act, 1881, which dealt with gifts and put them, under certain circumstances, on the same footing as gifts inter vivos and gifts by will. It contained provisions with respect to "property passing under voluntary settlements" and so forth. Between 1881 and 1889 a doubt must have arisen as to what was the effect of a person giving moneys accruing on his death, under a policy of insurance which he kept up for the benefit of somebody else, to that somebody else, and it appears to have been doubted whether in that case the gift would be liable to duty as a gift. Sect. 11, sub-s. 1, of the Act of 1889 accordingly provides that where the policy of insurance is wholly kept up for the benefit of a donee the money received by the donee shall be liable to account duty. Now, "donee" is a word which conveys a somewhat similar meaning to "volunteer," which is a word used in the earlier part of the section. Then came the Finance Act, 1894, which

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gave a different kind of duty called estate duty, and by s. 2, sub-s. 1 (*c*), gave it in respect of property as to which account duty was payable. Accordingly, s. 38 of the Act of 1881 and s. 11 of the Act of 1889 are incorporated in s. 2 of the Act of 1894, and property passing on the death of the deceased is to be deemed, for the purposes of the estate duty, property which would be liable to the account duty. Sect. 2 of the Act of 1894 also further amends s. 38 of the Act of 1881 and s. 11 of the Act of 1889 by cutting out the words "voluntary" and "voluntarily" and any reference to "volunteer." That being so, one would expect that the Legislature would also alter the word "donee," which was in that portion of s. 11 of the Act of 1889 which specially dealt with policies of insurance, because there would be no reason why, when they were making the duty payable in cases where the person receiving the benefit was not merely a volunteer, they should keep the word "donee." They do not alter the word "donee" by any express enactment, but they enact in s. 2, sub-s. 1, of the Act of 1894 a new clause—(*d*)—which deals with "any annuity or other interest purchased or provided by the deceased," &c. An annuity had been one of the things which had to some extent been defined in s. 38 of the Act of 1881, and joint annuities—namely, annuities passing by survivorship—had been dealt with. Then s. 2, sub-s. 1 (*d*), of the Act of 1894 brings in "other interest," and has practically, I think, the result, so far as regards policies of insurance, of taking away the effect of the word "donee" in the incorporated section. The Legislature might have done that by express words, and I should think they would have done it by express words had it not been intended to sweep in, not merely policies of insurance, but other interests as well, and accordingly you find apt words used for bringing in a policy of insurance which has been kept up for the benefit of a person who is not the donee because there has been some kind of consideration, and also for bringing in other things. So far I think there is no difficulty in arriving at the conclusion that s. 2, sub-s. 1 (*d*), of the Act of 1894 applies to the case before us, and s. 15 of course throws great light on the matter and assists that conclusion. The next question is whether in this

particular case the policy moneys are, on the true construction of s. 3, exempted from duty. Sect. 3 reads: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes." Applying that section to this policy, if you take the word "property" as referring to the policy itself, undoubtedly the policy, or the right to it, did not pass on the death of the deceased; it passed on the making of the settlement many years before. If, however, you read the word "property" as referring to the 1500*l.* payable under it, then that did pass on the death of the deceased because it became payable then, and in that sense it passed, and it passed also on the death of the deceased, partly, at any rate, by reason of the contract with the insurance company. Of course, if no contract had been made with the insurance company to insure the life of the deceased, and if the transaction had merely been a purchase, by the payment of premiums, of 1500*l.* to be paid on the deceased's death, that transaction would have been one to which s. 3 applied. It is possible, I think, that there might be some policies of insurance and policy moneys which might be brought within the section. If a person having an insurable interest in the life of another insured that life and paid the premiums, and if the moneys payable under the policy on the death of the other could be brought within some of the other sections of the Finance Act—though I do not think they could—then I think that s. 3 would operate to prevent the duty being payable. There one would have to read the words "the person under whose disposition the property passes" as covering the insurance company; the property would pass only by reason of the policy. But in the case before us it is, I think, quite impossible to say that the property passed only by reason of the contract with the insurance company. It passed by reason of a considerable number of other circumstances. Sect. 3, in my view, is a general section which cannot be read so as to alter the effect of the specific sections which precede it, and deal with policies of insurance and policy moneys.

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On these grounds I am of opinion that our judgment should be for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *J. L. Tomlin & Sons.*

W. A.

1900
Jan. 16.

THE PHARMACEUTICAL SOCIETY *v.* WHITE.

Pharmacy Acts—Sale of Poisons—Order taken by Agent—"Seller"—Pharmacy Act, 1868 (31 *&* 32 *Vict. c.* 121), *s.* 15.

Sect. 15 of the Pharmacy Act, 1868, imposes a penalty upon any person "who shall sell" poisons without being duly qualified. The defendant, who kept a florist's shop at Worcester and was not duly qualified to sell poisons, took from one of his customers an order for a "weed-killer," manufactured by a limited company at Liverpool and containing poison. The defendant did not keep any of the weed-killer in stock; but, in accordance with his usual practice, took the order, received from the customer the price of the quantity ordered, gave him a receipt, and forwarded the order to the company at Liverpool, who thereupon supplied the customer with the weed-killer. The defendant received from the company a commission of 25 per cent. in respect of all sales effected on orders sent to them by him. In an action for a penalty under s. 15:—

Held, that there was evidence to support a finding that the defendant was not the person who had the conduct and management of the sale, and, therefore, that he was not the seller of the poison within the meaning of the Act.

APPEAL from a decision of the judge of the Worcester County Court.

The action was brought by the Pharmaceutical Society to recover from the defendant a penalty of 5*l.* under s. 15 of the Pharmacy Act, 1868 (1), for having sold, or kept an open shop for retailing, poisons, not being a duly registered chemist.

(1) 31 & 32 Vict. c. 121, s. 15, provides: "Any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons . . . . not being a duly registered pharmaceutical chemist . . . . shall for every such offence be liable to pay a penalty or sum of 5*l.*, and the same may be sued for, recovered, and dealt with" in the prescribed manner.

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The following material facts were proved at the trial:—

The defendant kept a florist's shop at Worcester, and was not a duly registered pharmaceutical chemist. He was in the habit of taking orders from his customers for a preparation called a "weed-killer," manufactured by the Boundary Chemical Company, Limited, of Liverpool. The weed-killer contained a large quantity of arsenic, which is one of the poisons scheduled in the statute. He did not keep any of the weed-killer in stock, but took the order, received the price from the customer, gave a receipt for the money to the customer, and forwarded the order to the company at Liverpool, who delivered the quantity of weed-killer ordered to the purchaser. He was paid quarterly by the company a commission of 25 per cent. on the amount of all orders sent by him to them and executed by them, and he deducted that commission from the amount received by him in respect of orders for the weed-killer during each quarter. The penalty sued for in the action was in respect of an order taken by the defendant from a customer, who was supplied by the company with two drums of the weed-killer, the transaction being carried out in accordance with the usual practice before stated. The defendant, in his evidence, which the county court judge accepted, said that, on being asked for the weed-killer by the customer, he told him that he might either order it direct from the company, or that he, the defendant, would send the order to them. The receipt given by the defendant to the customer contained a bill-head of the company in Liverpool.

The county court judge found as fact, on the evidence, that the defendant was not the person who had the conduct and management of the sale to the customer. The judge, therefore, held that the defendant had not committed any breach of the provisions of the Pharmacy Act, 1868, and gave judgment for him.

The plaintiffs appealed.

Crump, Q.C. (*T. R. Grey* with him), for the appellants. The respondent was the person "selling" the weed-killer within the meaning of s. 15 of the Pharmacy Act, 1868. The cases shew that the person who "sells" need not be the principal in

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the sale; it is sufficient, in order to bring him within the Act, if he is the person who conducts the sale. The object of the Act is to secure, for the protection of the public, that persons who conduct the sale of poisons shall be duly qualified. Those propositions are supported by the judgments in *Pharmaceutical Society* v. *London and Provincial Supply Association, Limited* (1), where the House of Lords held that a limited company was not a "person" within s. 15, but that the person who actually conducted the sale for the company must be qualified. The language used by Grove J. in *Templeman* v. *Trafford* (2) and by Hawkins J. in *Pharmaceutical Society* v. *Wheeldon* (3) also supports the view that the Act aims at the person who in fact conducts the sale. On the evidence in the present case the respondent was the person who conducted the sale; he was delegated to conduct it by the company, who did nothing in the transaction except deliver the thing sold. [He also referred to *Cassaboglou* v. *Gibbs.* (4)]

Cavanagh, for the respondent, was not heard.

GRANTHAM J. I entertain no doubt that the decision of the county court judge was right. I think, on the evidence and on the judge's finding of fact, that the defendant was not the person managing or conducting the sale; he was a mere conduit-pipe for introducing one person to another. Take the case of a chemist's shop. Suppose a person comes in and asks an unqualified person—a boy behind the counter—for rat poison. Suppose the boy says, "My master is near at hand. I will go and tell him what you want," and the boy does go, and the master supplies the poison. Could it be said that the boy was the person who sold? In my opinion it certainly could not. If that be so, what difference does it make that the order is transmitted to some person not in the shop but at a distance, and he supplies the poison? In my view he is the person who manages the sale. It is true that he employs another person to take the order and receive the price, and

(1) (1880) 5 App. Cas. 857.
(2) (1881) 8 Q. B. D. 397.
(3) (1890) 24 Q. B. D. 683.
(4) (1882) 9 Q. B. D. 220; (1883) 11 Q. B. D. 797.

pays him a commission for doing so, but he himself manages the sale. I quite accept what was said by Grove J. in *Templeman* v. *Trafford* (1), and I think that the county court judge's decision was right on that authority. I also accept and approve of the judgment of Hawkins J. in *Pharmaceutical Society* v. *Wheeldon* (2), but it does not touch this case.

CHANNELL J. I am of the same opinion. The county court judge must be taken to have found as a fact that the defendant had not the conduct and management of the sale. The cases decide, as I gather, that a person may be liable under the statute although he is not the actual principal in the sale, if he has the conduct and management of the sale. Then comes the question, What is the meaning of having the conduct and management of the sale? So far as I can gather, the person who has the conduct and management of the sale must be a person who could do, or not do, the things which the Act requires in reference to the sale. The defendant here was no more than a carrier or messenger in reference to the sale, except that he got a commission out of it. I think there was evidence upon which the county court judge could find that the defendant was not a person who had the conduct and management of the sale. The appeal, therefore, fails.

Appeal dismissed.

Solicitors for appellants: *Flux, Thompson & Flux.*

Solicitors for respondent: *Timbrell & Deighton, for Dobbs & Hill, Worcester.*

(1) 8 Q. B. D. 397. (2) 24 Q. B. D. 683.

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Jan. 22.

[IN THE COURT OF APPEAL.]

THE LANCASHIRE ASYLUMS BOARD *v.* THE LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

Local Government — Rates — County — County Boroughs — Contribution for Special Purpose—County Rate Basis—Apportionment—Local Act—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 33—*Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 9—*Agricultural Rates Act*, 1896, *Orders*, *Art. xvii.*

By a local Act, passed in 1891, the lunatic asylums board of a county containing county boroughs were directed to raise in every year, by contributions from the county and the county boroughs, part of the expenses incurred by the board in the execution of their duties, and to divide the estimated amount to be raised for each year between the county and the county boroughs in proportion to their respective rateable values as ascertained under s. 33 of the Local Government Act, 1888:—

Held, that the provisions of the local Act were not affected by the Agricultural Rates Act, 1896, so that the board must still divide the estimated amount between the county and the county boroughs in proportion to their respective rateable values, and not according to their respective assessable values as ascertained under the Agricultural Rates Act, 1896, and the regulations of the Local Government Board made in pursuance of it.

Decision of the Divisional Court, [1899] 1 Q. B. 759, reversed.

Appeal from the decision of a Divisional Court, reported [1899] 1 Q. B. 759, on a special case stated in an action.

1. The Lancashire Asylums Board is constituted pursuant to the Lancashire County (Lunatic Asylums and other Powers) Act, 1891 (54 & 55 Vict. c. xx.) (Local), and is the lunatic asylums board for the administrative county of Lancaster and for fifteen county boroughs named in the 1st schedule of that Act.

2. The city of Manchester is one of the fifteen county boroughs.

3. Under s. 23 of the Act all expenses incurred by the asylums board in the execution of their duties shall be paid out of a fund to be called "The Asylums Fund," and any deficiency in that fund is to be raised by contributions to be made by the

administrative county and by each of the county boroughs in accordance with the provisions of that Act.

4. Sect. 24 enacts: "The board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values (as ascertained under s. 33 of the Local Government Act, 1888) of the county and the county boroughs, and shall add to the amount apportioned to the county boroughs the sum of 4000*l.*, or such other sum as may from time to time be fixed by agreement or by arbitration in manner provided by this Act (in this Act referred to as 'the added sum').

"The amount so apportioned, together with the added sum, shall be the aggregate amount required to be contributed by the county boroughs, and shall be contributed by them respectively in proportion to their respective rateable values ascertained as aforesaid. The balance of the amount required to be raised by the board shall be contributed by the county council."

5. Sect. 26 enacts: "For the purpose of obtaining payment of the sums to be contributed by the county and county boroughs respectively the chairman of the board shall before the first day of March in every year send to the county council, and to the council of each county borough, a precept for the payment of the amount to be contributed by the county or county borough as the case may be . . . . If the precept of the board is not complied with, the board may recover the sums due by action or other proceeding in any court of competent jurisdiction against the authority in default."

6. Sect. 33, sub-s. 2, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), enacts: "Where for the purpose of calculating any contribution or payment to be made under this Act it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and jurisdiction of

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quarter sessions and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the same. . . . ."

7. Up to the coming into operation of the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), the amounts required to be contributed in all precepts sent to the county council and to the council of each county borough, under s. 26 of the local Act, were calculated upon the respective rateable values of the county and the county boroughs ascertained and fixed in the manner prescribed by s. 33, sub-s. 2, of the Local Government Act, 1888, and according to the provisions of s. 24 of the local Act.

8. Sect. 1 of the Agricultural Rates Act, 1896, enacts that during the continuance of that Act the occupier of agricultural land in England shall be liable, in the case of every rate to which the Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments. The contributions of the county and county boroughs respectively are payable out of the county fund and borough fund respectively; and, in so far as they are payable out of rates, are payable out of the county rate and borough rate respectively, and the Agricultural Rates Act, 1896, applies to these rates.

9. In order to make up the deficiency, due to the provisions of s. 1 of the Agricultural Rates Act, 1896, in the amount which is raised by the authorities enumerated in the schedule to that Act, an annual grant is made, under s. 2, from the local taxation account to each of such authorities, in the Act called "spending authorities." (1)

10. In calculating the amount of the annual grant to be made under the Agricultural Rates Act, 1896, to the county council, and to the councils of each of the county boroughs,

(1) By s. 9 of the Agricultural Rates Act, 1896, "the expression 'spending authority' means any of the local authorities in England mentioned in the schedule to this Act."

Schedule: "County councils, councils of county boroughs, councils of boroughs and other urban districts and of rural districts, boards of guardians, the receiver of the metropolitan police district, school boards, highway boards, surveyors of highways."

who are respectively "spending authorities" within that Act, the deficiencies which would arise, owing to the provisions of s. 1, in the amount recoverable by each of such spending authorities, by means of rates levied to meet precepts of the asylums board, were ascertained in the manner prescribed by that Act and the rules made by the Local Government Board thereunder, and the amounts of such deficiencies were included in calculating such annual grants, and the corporation receives, and will receive annually, during the continuance of the Agricultural Rates Act, 1896, a grant from the local taxation account in respect of the deficiency in the amount levied by rates in respect of the precepts of the asylums board.

11. Upon the Agricultural Rates Act, 1896, coming into operation, a joint committee of the county of Lancaster, formed as required by s. 33, sub-s. 2, of the Local Government Act, 1888, prepared a basis or standard for county rates in accordance with Art. XVII. and Sched. Z of the Agricultural Rates Order, 1896 (1), which basis or standard was as follows:—

(1) Agricultural Rates Act, 1896 (Orders), Art. XVII.: "1. County councils and other councils whose duty it is to make, for the purposes of any rate to which the Act applies, a basis or standard or valuation which will not contain particulars of separately rated hereditaments, but only the total rateable value of each parish, shall cause a basis or standard or valuation to be prepared in the form set out in Sched. Z hereto, shewing (1.) the total rateable value of each parish in the county or other area to which the basis or standard or valuation applies according to the basis, standard, or valuation then in force, (2.) the total rateable value of a parish (according to such basis, standard, or valuation) divided, if the parish contains any agriculturul land, between (*a*) agricultural land, and (*b*) buildings and other hereditaments not being agricultural land, according to the proportion in which the total rateable value of the parish is so divided in the return made by the assessment committee as required in Art. X. 3 . . . . or by overseers as required by Art. XI., and (3.) the assessable value of each parish, that is to say, one-half the rateable value of the agricultural land in the parish, if the parish contains any agricultural land, added to the rateable value of the buildings and other hereditaments not being agricultural land, in the parish.

"2. Such basis, standard, or valuation shall, on or before the 10th day of February, 1897, be approved by the council, or by some committee authorized by the council to approve the same; and, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act, from and after the 31st day of March, 1897, the values of the several parishes as shewn in the column of such basis, standard, or valuation headed 'Assessable Value of the Parish, being one-

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"Agricultural Rates Act, 1896.

"The Temporary Basis or Standard for County Rates.

Name of Township.	Net annual value of each Township according to the basis, standard, or valuation in force at the passing of the Act.	Net annual value of each Township as shewn in column 2 divided between agricultural land and buildings and other hereditaments not being agricultural land in the proportion in which the rateable value of the Township is so divided in the return made by the Assessment Committee.		Assessable value of the Township, being one-half the amount in column 3 added to the amount in column 4.
		Net annual value of agricultural land in the Township.	Net value of the buildings and other hereditaments not being agricultural land in the Township.	
1.	2.	3.	4.	5.

The net annual values set forth in the second column were the net annual values ascertained by a joint committee under s. 33 of the Local Government Act, 1888, and were included in the basis or standard for county rates allowed and confirmed by the county council on August 4, 1892, which basis or standard was in force at the passing of the Agricultural Rates Act, 1896.

12. The amounts required by the precepts sent by the asylums board to the county council and to the councils of each of the county boroughs have, since the Agricultural Rates Act, 1896, came into operation, been calculated upon the values ascertained in the manner described in the last column of the "Temporary Basis or Standard for County Rates," and, with the exception of the amount required by the precepts herein-

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half the amount in column 3 added to the amount in column 4' shall during the continuance of the Act be the basis, standard, or valuation for the levying of county rate or any other rate leviable by the council according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law."

after mentioned, have been duly paid to the treasurer of the asylums board.

13. Before March 1, 1897, the asylums board estimated the total amount to be raised by contributions for the then ensuing year, and divided that amount between the county council and the county boroughs in proportion to the respective values thereof ascertained in the manner described in the last column of the Temporary Basis or Standard, and with the addition required by s. 24 of the local Act. The portion of the amount to be contributed by the corporation was directed to be raised by two half-yearly instalments.

14, 15, and 16. The first instalment was paid by the council of the city of Manchester, without prejudice to the questions raised in this special case. On the chairman of the asylums board sending a precept for the payment of the second instalment, the council of the city of Manchester paid to the treasurer of the asylums board the amount which, added to the amount of the first instalment, the council would have had to pay towards the total amount estimated by the asylums board as necessary to be raised by contributions for the year, if such total amount had been divided between the county council and the county boroughs in proportion to the respective rateable values thereof ascertained and fixed in the manner stated in paragraph 7 of this case, and set forth in column 2 of the Temporary Basis or Standard for County Rates referred to in paragraph 11.

This action was brought by the asylums board to recover the balance—357*l.* 9*s.* 5*d.*—alleged to be due upon the precept for the second instalment.

The questions for the opinion of the Court were: Whether the asylums board, in dividing the total amount required by it to be raised by contributions for any year during the continuance of the Agricultural Rates Act, 1896, is—

(1.) To divide that amount between the county and the county boroughs ascertained in the manner specified in the last column of the Temporary Basis or Standard for County Rates referred to in paragraph 11 of the case; or,

(2.) To divide that amount between the county and the

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county boroughs in proportion to the respective rateable values of the county and the county boroughs ascertained in the manner described in paragraph 7 of the case, and set forth in column 2 of such temporary basis or standard.

The Divisional Court (Bruce and Ridley JJ.) gave judgment for the plaintiffs. (1)

The defendants appealed.

1899. Dec. 19. *Macmorran, Q.C.*, and *Walter C. Ryde*, for the defendants. The provisions of the Agricultural Rates Act, 1896, have no bearing on the ascertainment of the proportions in which the county and county boroughs are to contribute. The asylums board is not a rating authority or a spending authority, nor does it receive any sum by way of annual grant. The question the board has to deal with is not the raising of money by rates, but the division between the county and the county boroughs of the amount to be raised by contributions from them towards defraying the expenses of the board. This amount has by s. 24 of the local Act to be divided in proportion to the respective "rateable values" of the county and county boroughs as ascertained by the joint committee under s. 33, sub-s. 2, of the Local Government Act, 1888. The Agricultural Rates Act, 1896, does not in any way alter the meaning of "rateable value." There are no terms in the Act which can have the effect of substituting "assessable value" for "rateable value" for the purposes of the local Act. "Assessable value" only exists for the purposes of the Agricultural Rates Act, 1896, and that Act has nothing to do with the ascertainment of the proportions in which the county and the county boroughs are to contribute to the asylums board's expenses. These proportions must, therefore, still be ascertained as provided for by the local Act. When that has been done, and the board has issued its precepts, the authorities which have to raise the amounts of the precepts will have to apply the machinery of the Agricultural Rates Act, 1896, which provides by way of relief to the occupiers of agricultural land that rates shall only be assessed on one-half of the rateable

(1) [1899] 1 Q. B. 759.

value of their land. If the contention of the asylums board is correct, the relief will be given twice over, once in making the apportionment, and again in levying the rate.

Cripps, Q.C., and *R. Cunningham Glen*, for the plaintiffs. The effect of the Agricultural Rates Act, 1896, is that the term "rateable value" as used in the local Act must now be read as equivalent to "assessable value." What in substance had to be done under the local Act was to divide the joint expenditure between the county and the county boroughs respectively in proportion to the length of their respective purses. Before the Act of 1896 the length of the county's purse depended on "rateable value" in the ordinary sense. Since the Act it depends on "assessable value." Sect. 24 of the local Act of 1891 must be read subject to the provisions of the Act of 1896, and the respective values of the county and the county boroughs must be ascertained as provided by that Act. The effect of ss. 5 and 6 of the Act and the regulations made by the Local Government Board under the latter section is that the assessable value as ascertained in accordance with Art. XVII. and Sched. Z of the regulations is to be the basis of the county rate for all purposes instead of the rateable value ascertained as provided for by the Local Government Act, 1888, s. 33. The result is that when the proportions in which the joint expenditure is to be divided between the county rate and the borough rates are to be ascertained, that basis must be taken as representing the length of the county's purse as compared with the length of the county boroughs' purses.

Macmorran, Q.C., in reply.

Cur. adv. vult.

1900. Jan. 22. The judgment of the Court (A. L. Smith, Collins, and Vaughan Williams L.JJ.) was read by

A. L. SMITH L.J. The question which has arisen between the Lancashire Asylums Board and the corporation of Manchester is whether the asylums board, under s. 24 of a local Act called the Lancashire County (Lunatic Asylums and other Powers) Act, 1891, is to divide between the county of Lancaster and the county boroughs of that county the contributions which

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the asylums board annually requires, in order to defray the expenses of the county lunatics, in proportion to the "rateable values" of the county and county boroughs, as was the case prior to the passing of the Agricultural Rates Act of 1896, or in proportion to the "assessable values" of the county and county boroughs to be found in the later Act.

The corporation of Manchester asserts that the question of the division of the contributions to be made between the county and the county boroughs is not touched by the Agricultural Rates Act, 1896, though the method of rating the county and county boroughs is thereby altered. The asylums board on the other hand asserts that what was once "rateable value" is now no more, and that, as regards the division which the board is to make, "assessable value" has taken the place of "rateable value," so long as the Agricultural Rates Act of 1896 is in existence.

The point is one which makes a considerable difference to the corporation of Manchester—and indeed to the other county boroughs in Lancashire—as regards the amount it can be annually called upon to contribute towards the expenses necessary for maintaining the county lunatics.

Prior to the Agricultural Rates Act, 1896, matters stood thus. By the County Rate Act, 1852, ss. 2, 6, and 21, justices in counties were to prepare a basis or standard for fair and equal county rates, rateably and equally according to the full and fair annual value of the property within their respective limits, and were to order and direct a fair and equal county rate according to such basis or standard. By s. 33, sub-s. 2, of the Local Government Act, 1888—which is the Act which created certain boroughs county boroughs (of which Manchester is one), and which established county councils and joint committees of counties and county boroughs—it was enacted, "Where, for the purpose of calculating any contribution or payment to be made under this Act, it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and

jurisdiction of quarter sessions and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the same." The object, I apprehend, of appointing this joint committee was that it might see that the rateable values of the county and county boroughs were fairly adjusted.

In the year 1891 the county of Lancashire obtained special legislation by means of a local Act, entitled the Lancashire County (Lunatic Asylums and other Powers) Act, 1891, whereby a lunatic asylums board for the County Palatine of Lancaster was created, which board was to provide asylum accommodation and to carry out other matters as a local authority under the Lunacy Act, 1890.

By s. 34 of the local Act it is enacted that, for the purposes of that Act, the rateable value of the county and of the county boroughs shall be their rateable values as ascertained and fixed for the time being by the joint committee appointed under s. 33 of the Act of 1888.

By s. 23 of the local Act all expenses incurred by the asylums board in the execution of its duties are to be paid out of a fund called the Asylums Fund, and any deficiency in that fund is to be raised by contributions to be made by the county and county boroughs in accordance with the provisions of the Act.

By s. 24 of the local Act it is enacted that "the board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values as ascertained under s. 33 of the Local Government Act, 1888."

By s. 26 of the local Act it is enacted that, "for the purpose of obtaining payment of the sums to be contributed by the county and the county boroughs respectively, the chairman of the board shall before the 1st day of March in every year send to the county council and to the council of each county borough a precept for payment of the amount to be contributed by the county or county borough as the case may be."

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Although I have had to refer to many sections in different Acts, down to this point it is perfectly plain that the division which the asylums board has to make of the contributions which it requires from the county and county boroughs was to be in proportion to their respective rateable values. This division and the sending of the precepts were the only things the asylums board had to do as regards the money to be obtained from the county and county boroughs under the local Act of 1891. The board was in no way concerned in rating or levying a rate either upon the county or county borough. Has, then, this division been altered by the Agricultural Rates Act, 1896, which was an Act to last for five years from March 31, 1897, from which date the Act was to come into operation? This Act is an Act by which the occupiers of agricultural land are for five years to be exempted from the payment of half the rates which they would otherwise have had to pay upon such lands, and it is the rating of agricultural land, in my opinion, which is dealt with by this Act. If the division of the contributions by the asylums board between the county and county boroughs is to be made in proportion to the "assessable values" mentioned in the Agricultural Rates Act, 1896, and not in proportion to the "rateable values" as prescribed by s. 24 of the local Act of 1891, this would operate much to the detriment of the county boroughs.

The question therefore is, What is the division the asylums board has now to make between the county and the county boroughs? Is it the same as under the local Act of 1891, and before the passing of the Agricultural Rates Act, 1896—i.e., in proportion to the "rateable values" of county and county boroughs; or in proportion to the "assessable values" as found in the Agricultural Rates Act, 1896, so that the words "rateable values" in s. 24 of the local Act of 1891 are now to be read differently from what they would have been undoubtedly read when the Act of 1891 was passed and for five years afterwards? It will be observed, when considering the scope of the Agricultural Rates Act, 1896, which is a general Act, that nowhere in it can be found any express repeal of any part of the local Act of 1891, and, what is more, nowhere in the

Agricultural Rates Act, 1896, is the local Act of 1891 so much as mentioned. The local Act is left precisely where it was at the time it was passed, and for the best of all reasons, as it appears to me; for the local Act of 1891 in no way embraces either the rating or levying of rates either in a county or county boroughs by the asylums board, with which the Agricultural Rates Act, 1896, irrespective of the asylums board, now deals. The learned judges in the Queen's Bench Division felt this difficulty in their way, for they say: "It is true that the precise position and duties of the Lancashire Asylums Board are not dealt with by the Agricultural Rates Act, 1896"—I say not so much as mentioned or dealt with at all—"but we cannot, therefore, exclude it from an Act of so general intention." The general intention of the Agricultural Rates Act, 1896, is to take off from occupiers of agricultural lands one-half of their rates for a period of five years; but how does this alter the division the asylums board is to make, when the division by the asylums board is not dealt with by the Agricultural Rates Act, 1896, from first to last?

The Agricultural Rates Act, 1896, is intituled as being an Act to amend the law with respect to the rating of the occupiers of agricultural land in England, and for other purposes connected therewith. By s. 1 it exempts the occupier of agricultural land from paying the whole rate, as he theretofore had done, and limits his liability to half of the rate, and it enacts that the deficiency thereby created is for five years to be made up by the Commissioners of Inland Revenue. It is clear, and indeed it is admitted by counsel for the asylums board, that s. 3 of the Agricultural Rates Act, 1896, has no reference to this case, and I might pass it by; but I think I should point out that the section only deals with the levying of the rate by persons entitled to do so, that is, by the spending authority, which the asylums board is not, and it has nothing to do with the division of contributions required by the asylums board. Sub-sect. 2 of s. 3 is only for the purposes of s. 3, and therefore admittedly does not apply. But this is how it is argued for the asylums board. It is said that s. 5 of the Agricultural Rates Act, 1896, enacts that in every valuation list and the basis and standard

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of any county rate the value of agricultural land shall be stated separately from that of any building or other hereditament, and that the total rateable value of agricultural land in each parish shall be stated separately from the total rateable value of the buildings and other hereditaments, and that, by s. 6, sub-s. 3, of this Act, the Local Government Board, for the purpose of ascertaining the deficiency and for the separation of value of agricultural land from buildings and other hereditaments, and generally for carrying into effect this Act, is to make regulations, and that these regulations coupled with s. 5 alter the division of contributions which the asylums board is to still make under s. 24 of the local Act of 1891, and that the division by the asylums board is now to be made upon the "assessable value," and not upon the "rateable value" under that section. How s. 5, which applies to the rating of agricultural lands separately from buildings and other hereditaments, can be held to touch the division the asylums board is to make, I do not see, and the regulations are for the levying of the rates, and not for the division of contributions. Art. XVII. of the regulations and the form in Sched. Z when read shew this to be so. Column 2 in Sched. Z deals with the net annual value of each parish according to the basis, standard, or valuation in force at the passing of the Act of 1896—i.e., rateable value beyond a doubt—and columns 3 and 4 deal with net rateable value divided between agricultural land and buildings and other hereditaments not being agricultural land. And by column 5 "assessable value" of a parish is one-half of the amount of agricultural land added to the amount of the other hereditaments other than land. These provisions were necessary to carry out the scheme of exonerating the occupier of agricultural land from paying the whole of the rate based upon the rateable value of this land, which before the Agricultural Rates Act of 1896 he had to pay, that being the object of the Act; and in my judgment neither s. 5 nor the regulations under the Act of 1896 have anything to do with the division the asylums board has to make under s. 24 of the local Act of 1891. There is a well-known rule which has application to this case, which is that a subsequent general Act does not

affect a prior special Act by implication. That this is the law cannot be doubted, and the cases upon the subject will be found collected in the third edition of Maxwell on the Interpretation of Statutes, pp. 242–3, and I need not refer to them. Applying this rule to the present case, how does the general Act of 1896 affect the special legislation of 1891? Surely, it does not do so at all. For the reasons above I am of opinion that the "rateable values" upon which the asylums board were to make the division for contributions under s. 24 of the local Act of 1891 have not been touched by the general Act of 1896, and that the first question put to us must be answered in the negative, and the second in the affirmative, and that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Ridsdale & Son, for F. C. Hulton, Preston.*

Solicitors for defendants: *Austin & Austin, for W. H. Talbot, Manchester.*

A. M.

1900
Jan. 30.

LLANDUDNO URBAN DISTRICT COUNCIL, APPELLANTS; HUGHES, RESPONDENT.

Market—Sale within Prescribed Limits—Licensed Hawker—Exemption—Sale by Licensed Hawker of Goods for which Licence unnecessary—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.

A licensed hawker, although he is selling goods for which a hawker's licence is not required, is "a licensed hawker" within the meaning of s. 13 of the Markets and Fairs Clauses Act, 1847, and, therefore, is not liable to the penalty imposed by the Act upon every person "other than a licensed hawker" who, after the market-place is open for public use, sells within the prescribed limits articles in respect of which tolls are by the special Act authorized to be taken in the market.

CASE stated by justices.

An information was preferred by the appellants against the respondent under s. 13 (1) of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), for having, within the limits of their district and after a market-place was there opened for public use, exposed for sale in a street, and not in his own dwelling-house or shop, certain goods—namely, potatoes—in respect of which tolls were authorized to be taken in the said market.

A market had been duly established and opened by the appellants within their district. Potatoes were articles in respect of which toll was authorized to be taken in the market, and the respondent exposed potatoes for sale as alleged by the appellants. The respondent had for many years followed the trade of selling vegetables and fruit within the district without holding a hawker's licence, but in consequence of a notice published by the appellants he had taken out a hawker's licence before the alleged offence. It is not necessary, by s. 3, sub-s. 3, of the Hawkers Act, 1888 (51 & 52 Vict. c. 33), for a hawker's

(1) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13:—

"After the market-place is open for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

licence to be taken out by any person selling "fish, fruit, victuals, or coal."

The appellants contended that, as the respondent was selling goods for which a hawker's licence was not necessary, he was not entitled to exemption as "a licensed hawker" within the meaning of s. 13 of the Act of 1847.

The justices were of opinion that the respondent was within the exemption as a licensed hawker, and dismissed the information.

The question for the opinion of the Court was whether the justices' decision was correct in point of law.

E. H. Lloyd, for the appellants. In s. 13 of the Markets and Fairs Clauses Act, 1847, the exception of "a licensed hawker" applies only to a person who is a licensed hawker and is selling goods for which a hawker's licence is necessary—that is, it applies only to a licensed hawker who is acting as a licensed hawker by selling goods for which a hawker's licence is required: *Woolwich Local Board of Health* v. *Gardiner* (1); *Howard* v. *Lupton* (2); *Openshaw* v. *Oakeley*. (3)

A. E. Griffith, for the respondent. By the plain words of s. 13, every person who is in fact "a licensed hawker" is excepted. The cases which have been cited are distinguishable, because in those cases the pedlar or hawker was acting in breach of his licence.

CHANNELL J. I think that this appeal must be dismissed. The Act says that "every person other than a licensed hawker who shall sell, &c.," shall be liable to a penalty. Now, the respondent was a licensed hawker, and primâ facie came within those words in the Act, and we must so hold unless it is clear that, upon the true construction of the Act, he did not come within those words. In *Woolwich Local Board* v. *Gardiner* (1) the case was that of a pedlar who was acting in breach of his licence, and, therefore, could not claim the exemption. Here the respondent was not doing anything in

(1) [1895] 2 Q. B. 497.
(2) (1875) L. R. 10 Q. B. 598.
(3) (1889) 60 L. T. 929; 53 J. P. 740.

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breach of his licence, but was only doing that which could be done without any licence. I think that the respondent was clearly within the exception, and that the justices were right.

BUCKNILL J. concurred.

Appeal dismissed.

Solicitors for appellants: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

Solicitors for respondent: *Kennedy, Hughes & Co., for Corbett, Llandudno.*

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Jan. 16.

CHARNOCK, APPELLANT; MERCHANT, RESPONDENT.

Criminal Law—Evidence—Examination of Defendant—Previous Conviction—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41)—*Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *ss.* 1, 6.

The appellant was charged before a court of summary jurisdiction with an offence under the Prevention of Cruelty to Children Act, 1894, and gave evidence on his own behalf as that Act permits. He was asked in cross-examination whether he had not been previously convicted of a similar offence, and answered that he had. The Criminal Evidence Act, 1898, s. 1, enables "every person charged with an offence" to give evidence on his own behalf; but (*f*) "a person charged and called as a witness in pursuance of this Act" shall not be asked or required to answer any question tending to shew that he has been convicted of any other offence than that with which he is charged. By s. 6, "this Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act."

The court of summary jurisdiction convicted the appellant:—

Held, that s. 1 of the Criminal Evidence Act, 1898, applied; that the evidence of the appellant's previous conviction was wrongly admitted, and, therefore, that the conviction was bad.

CASE stated, under the Summary Jurisdiction Acts, by four justices of the county of Hereford.

At a court of summary jurisdiction held at Wigmore in the same county the appellant was charged, on the information of the respondent, an inspector of the National Society for the Prevention of Cruelty to Children, for that he, the appellant, having the charge or care of a child named Arthur Price,

under sixteen years of age, unlawfully and wilfully assaulted that child in a manner likely to cause him unnecessary suffering or injury to his health, contrary to the provisions of s. 1 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

At the hearing before the justices it was proved to their satisfaction that the appellant, who was the master of a public elementary school, did commit the offence charged by assaulting Arthur Price, one of the school-children, contrary to the provisions of the statute.

During the hearing of the case the appellant was called as a witness in his own behalf by his counsel, and upon cross-examination by the solicitor for the respondent the defendant was asked whether he had been previously convicted for a similar offence. The appellant's counsel objected that the question was inadmissible.

The justices overruled the objection and allowed the question to be put. The appellant then admitted that he had been previously convicted of an assault upon a boy under his charge.

The justices convicted the appellant and imposed a fine upon him.

They stated in the case that the appellant's answer as to his previous conviction in no way affected their minds, as the fact of the previous conviction was well known to all of them, three out of their number having adjudicated on the occasion when he was so convicted.

The questions for the opinion of the Court were :—

1. Whether under the circumstances stated in the case the question as to the previous conviction was admissible:

2. Whether, if the question was wrongly admitted, the conviction was thereby invalidated, as the justices found the appellant guilty of the offence charged on the facts proved before them.

H. Lynn (*J. A. Organ* with him), for the appellant. The Prevention of Cruelty to Children Act, 1894, s. 12, enables a person charged with an offence under that Act to give evidence on his

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own behalf, and there is no restriction on the questions which may be put to him in cross-examination. The justices appear to have thought that, as the appellant was proceeded against under that Act, he might be asked about his previous conviction. They were clearly wrong. By reason of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (*f*), the appellant could not be asked as to his previous conviction, and by s. 6, "this Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act."

[He was stopped.]

Cecil Walsh, for the respondent. Sect. 6 of the Criminal Evidence Act, 1898, does not alter the provisions of prior Acts which are not inconsistent with it. The words in s. 6, "notwithstanding any enactment in force at the commencement of this Act," mean "notwithstanding any enactment to the contrary in force, &c." There is no enactment inconsistent or to the contrary in the Prevention of Cruelty to Children Act, 1894, under which Act the proceedings against the appellant were taken. He tendered himself as a witness in pursuance of the Prevention of Cruelty to Children Act, not "in pursuance of this Act," which are the words used in s. 1 (*f*) of the Criminal Evidence Act. Sect. 1 of the Criminal Evidence Act was intended to apply only to proceedings by indictment, not to proceedings before courts of summary jurisdiction. Even if the evidence of the appellant's previous conviction was not legally admissible, the conviction ought not to be quashed, because the justices state that his answer did not influence their minds, and as a court of summary jurisdiction they were entitled to use their own knowledge.

GRANTHAM J. Unfortunately in this case the magistrates have taken a course which was illegal. They allowed a question to be put to the appellant which was not legally admissible. It may be that the fact of the previous conviction did not affect their judgment, though they do not say that; they only say that his answer did not affect their minds. As to the point taken that the provisions of s. 1 of the Criminal Evidence Act,

1898, do not apply to alter the provisions of prior Acts which are not inconsistent, I can say from my own knowledge that since the passing of the Act of 1898 it has always been applied by the judges in cases under the Criminal Law Amendment Act, 1885. I am of opinion that the conviction was wrong, and that it should be quashed.

CHANNELL J. I am of the same opinion. It is of great importance to hold that the Criminal Evidence Act, 1898, has established one rule to be observed in all criminal courts and cases. The 6th section amply establishes that. If the contention made for the respondent were well founded, in cases under the Criminal Law Amendment Act, 1885, the defendant could still be cross-examined as to previous convictions, and prosecuting counsel, if the defendant did not give evidence on his own behalf, would still have the right to comment on that fact in his reply. The practice, since the Act of 1898 was passed, has always been to the contrary, and s. 6 makes it quite clear that the right course has been pursued.

Conviction quashed.

Solicitors for appellant: *Baker & Nairne.*

Solicitors for respondent: *Chester, Broome & Griffiths, for Corner & Co., Hereford.*

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Dec. 16.

[IN THE COURT OF APPEAL.]

FRANCIS *v.* TURNER BROTHERS.

Employer and Workman—Compensation—Employment on or in or about a Factory—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The expression "employment by the undertakers . . . . on or in or about a . . . . factory" in s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, means employment by the undertakers on, in or about their own factory. A workman, therefore, who is sent by his employers on their business to the factory of a third party, and is there injured by accident, is not entitled to compensation under the Act.

APPEAL from a decision of the judge of the Newtown (Montgomeryshire) County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The appellant was a workman in the employment of the respondents, who were the occupiers of a factory. About half a mile from the respondents' factory was another factory belonging to the Severn Tweed Company. The respondents had bought an engine which stood in the engine-shed of the Severn Tweed Company's factory, and on the day of the accident the appellant had been sent with other workmen to the last-named factory to remove the engine and to bring it to the respondents' factory. Close to the engine which was to be removed was a wooden prop which ran up from the floor to two iron girders supporting a tank in the roof of the shed. In order more conveniently to remove the engine the men wished to get the prop out of the way, and they consulted the foreman of the Severn Tweed Company's factory as to whether the prop was supporting anything and whether it might be removed, and they were told by him that it might be knocked down. They accordingly removed it, when the roof collapsed and the tank fell, killing two men and injuring the appellant. At the back of the shed there was an engine pumping water for the use of the Severn Tweed Company's mill; it also worked a carding machine outside the shed, but close to where the men were at work at the time of the accident. The learned

county court judge found that the employment of the appellant was not an employment by the undertakers on or in or about a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

The workman appealed.

Ellis J. Griffiths, and *H. C. Davenport*, for the appellant. The employment of the appellant at the time of the accident was an employment on, in or about a factory within the meaning of s. 7 of the Workmen's Compensation Act. First, the definition of "factory" in s. 7, sub-s. 2, is not confined to the employer's own factory; it is sufficient if the accident happens in, on or about a factory to which the workman goes on the employer's business with the employer's assent. The employer cannot absolve himself from responsibility by sending a workman from his own factory to another sphere of work equally dangerous. Secondly, for the purposes of this Act the respondents were occupiers of the engine-room of the Severn Tweed Company, which was itself a separate factory. By s. 7, sub-s. 2, "undertakers" in the case of a factory is defined as meaning the occupier within the meaning of the Factory and Workshop Acts, 1878 to 1895, and the respondents were the occupiers of this engine-room within the meaning of s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, they being in actual occupation by their workmen at the time of the accident. The entry of the workmen under licence to remove the engine was sufficient to give the respondents the actual occupation and user of the engine-shed.

Ruegg, Q.C., and *Arthur Powell*, for the respondents, were not called upon to argue.

A. L. SMITH L.J. I cannot entertain any doubt that this appeal should be dismissed. The respondents are the owners of a factory, in which the appellant was employed as one of their workmen, and if the appellant had been injured while working in that factory, he would clearly have been within the purview of the Act; that, however, was not the case. What happened was this. The respondents had bought an engine in

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another factory half a mile away from their own factory, and they sent the appellant and other workmen to remove the engine from the other factory and bring it to their own; while in the other factory the accident happened by which the appellant was injured. Those are the facts; there is nothing else that is really material. Does the case fall within s. 7, sub-s. 1, of the Workmen's Compensation Act, which provides that "this Act shall apply *only* to employment by the undertakers as hereinafter defined on or in or about a . . . . factory"? It is suggested that the sub-section includes employment at a factory belonging to another man, but in my opinion it clearly does not: the sub-section is dealing with employment on the factory of the undertaker. An undertaker in the case of a factory is defined by s. 7, sub-s. 2, as meaning the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. Were the respondents occupiers of the Severn Tweed Company's factory within the meaning of that definition? In my opinion they clearly were not; the section means that the undertakers must be occupying and carrying on their business in the factory, and the respondents were certainly not occupying and carrying on their business in the Severn Tweed Company's factory merely because they sent their men there to remove the engine. I am, therefore, clearly of opinion that s. 7, sub-s. 1, applies only to employment in, on or about the employer's own factory, and does not apply to employment in, on or about a factory belonging to another man. There is nothing in the Factory Acts that is in the least contrary to this view, and an occupier is a well-known expression with a well-known meaning; he is (in the case of a business) the man who occupies business premises and carries on business in them; if he sends to another man's premises, he does not, therefore, occupy them. It has been contended for the appellant that he is assisted by the definition in the Factory Acts, but that really puts him in no better position. The question is what is the meaning of occupying a factory; and we are referred to the definition in s. 23 of the Factory and Workshop Act, 1895, which prescribes what is an occupation as regards machinery and plant, which have been dragged into the definition of factory by

s. 23, sub-s. (*a*) and (*b*). It is quite unnecessary for us to give an exhaustive statement of the effect of that section; it is sufficient to say that any definition in that section is inserted for the special purpose of that section, which has really nothing to do with the question before us.

COLLINS L.J. and VAUGHAN WILLIAMS L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Woosnam & Smith, for Martin Woosnam, Newtown.*

Solicitors for respondents: *William Hurd & Son, for Williams, Gittins & Taylor, Newtown.*

W. J. B.

[IN THE COURT OF APPEAL.]

HENSEY *v.* WHITE. LLOYD *v.* SUGG & CO. WALKER *v.* LILLESHALL COAL COMPANY, LIMITED.

Employer and Workman—Compensation—Injury by Accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

The word "accident," as used in the Workmen's Compensation Act, 1897, involves the idea of something fortuitous and unexpected.

Where a workman suffers injury while doing his ordinary work in his ordinary way, and the primary and efficient cause of the injury is his diseased or impaired physical condition at the time, the injury is not caused by accident within the meaning of the Act. Where, however, injury is caused to a workman by some fortuitous and external event, it is caused by accident within the meaning of the Act, although the injury may be aggravated by his physical condition at the time of the accident.

APPEALS under the Workmen's Compensation Act, 1897, raising the question of what is an accident within the meaning of that Act.

HENSEY *v.* WHITE.

Appeal of the applicant from a decision of the judge of the Bedford County Court upon an application for compensation

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made on behalf of the widow and children of a deceased workman.

The deceased was a cabinet-maker working for the respondent, and it was part of his duty to start the gas-engine in the morning, which was done by turning a wheel. On the morning when the men resumed work after the Christmas holidays, the deceased was standing at one side of the wheel endeavouring to hoist it, and other workmen were on the other side of the wheel pulling it backwards. The wheel was cold through disuse, and air had got into the engine, and at first the wheel would not move. The men then made another attempt, the deceased endeavouring to hoist the wheel as before, and they succeeded in moving the wheel a little. The deceased immediately placed his hand to his stomach and went outside; he was followed and found to be vomiting blood, and was then taken on an ambulance to the hospital, where he very shortly died, the cause of death being rupture of the small blood-vessels of the stomach and intestines. A post-mortem examination was held by two doctors, who were called as witnesses for the applicant, one of whom had attended the deceased at different times for chronic indigestion. From their evidence it appeared that there was slight ulceration of the pylorus of some standing, and that there was also slight chronic inflammation over the whole of the surface of the stomach. They were of opinion that the effusion of blood was consistent with its having been caused by the strain; that the cause of death was rupture of the intestines owing to the strain; that the inflammation of the stomach had probably nothing to do with the cause of death, and that the deceased might have lived to the ordinary term of life notwithstanding the congestion and ulceration. A doctor called on behalf of the respondent was, however, of opinion that the rupture of the internal organs could not have been the result of the strain, and that an antecedent cause must be looked for, which was to be found in the weakened state of the organs, owing to chronic inflammation and congestion. The learned county court judge was of opinion that something beyond the mere fact that a long-standing disease had suddenly assumed a fatal form in consequence of the deceased doing his

ordinary hard work in the usual way was necessary in order to constitute an accident within the meaning of the Act, for example, a fall, a break of the machinery or tools, or something external to the ordinary course of employment; and he found as a fact that the deceased was suffering from chronic congestion and inflammation of the coats of the stomach, and that the fatal loss of blood from the stomach was the result of the chronic disease, and would not have occurred without it. He therefore gave judgment for the respondent on the ground that the death of the deceased was not the result of an accident within the meaning of the Act. The applicant appealed.

Shearman, for the appellant. There was no evidence upon which the county court judge could properly find that the death was the result of disease and not of an accident. The cause of death in law is the proximate or immediate cause which produces the effect, and it is impossible to look beyond that to the predisposing cause. In *Winspear* v. *Accident Insurance Co.* (1), a man who, while crossing a stream, was seized with an epileptic fit and fell into the stream and was drowned was held to be within the terms of an insurance policy against "any personal injury caused by accidental, external, and visible means," the proximate cause—drowning—being the only one looked to. So, too, in *Lawrence* v. *Accidental Insurance Co.* (2), a man who was seized with a fit on a railway platform and fell under, and was killed by, a passing train, was held to be within a policy of insurance against death from accidental injury, although there was an express exemption of death arising from fits. In the present case, the disease was only the antecedent cause which rendered the deceased more liable to such an accident as the rupture of the blood-vessels of the affected organ. [He also cited *Hamlyn* v. *Crown Accidental Insurance Co.* (3); *Pugh* v. *London, Brighton and South Coast Ry. Co.* (4)]

E. Morten, for the respondent, was not called upon to argue.

Dec. 2. A. L. SMITH L.J. I think that this appeal should be dismissed. The question turns entirely on s. 1, sub-s. 1,

(1) (1880) 6 Q. B. D. 42.
(2) (1881) 7 Q. B. D. 216.
(3) [1893] 1 Q. B. 750.
(4) [1896] 2 Q. B. 248.

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of the Workmen's Compensation Act, 1897, which makes an employer liable to pay compensation if in any employment to which the Act applies personal injury *by accident* arising out of and in the course of the employment is caused to a workman, and what we have to determine is whether upon the findings of the learned county court judge this was a case of death by accident within the meaning of that section. The deceased was at his ordinary work; he and his fellow-workmen were endeavouring to set a wheel in motion in order to start a gas-engine, but the wheel was stiff owing to disuse during the Christmas holidays, and there was a difficulty in starting it. After some attempts the men had just succeeded in moving it, when the deceased put his hand to his stomach and almost immediately began to vomit blood, and continued to do so until his death. At the post-mortem examination it was discovered that certain of his internal organs were not in the natural state which those of a sound and healthy man should be in. On the one side evidence was given as to the state of the deceased's internal organs; the other side relied upon the view taken by a medical expert, and the county court judge had to decide between the two. To put it shortly, the witnesses on the one side said that his death was caused by the unexpected strain due to the stiffness of the wheel; on the other side it was said that it was due to the physically unsound state of his body. Upon this conflicting evidence the judge seems to have found that the death was due to disease, though it was possibly accelerated by the strain in endeavouring to move the wheel, and in his painstaking and elaborate judgment he gives due weight to the fact that the deceased was doing his ordinary work at the time, and that that work was possibly heavier than usual. I am not able to disturb that judgment; indeed, I agree that the death appears to have arisen from disease, and not from accident. It is unnecessary to go through the cases cited in argument, which were cases arising upon policies of insurance, and do not touch the present case.

COLLINS L.J. I am of the same opinion. It seems quite clear upon the findings of the learned county court judge that

the element of accident was entirely wanting; and that, on the other hand, the diseased condition of the man's internal organs was the real cause of his death. In the ordinary course of his work he was applying more than ordinary pressure to the wheel, and it is said that the injury which he received while doing so was the result of an accident; what he was doing, however, he was doing deliberately and in the ordinary course of his work, and that which happened was in no sense a fortuitous event. Lord Halsbury, in his judgment in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1), says: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident,'" and that is a view which entirely commends itself to me. In the present case there is an entire lack of the fortuitous element. In all the cases cited during the argument there was an element of the fortuitous and unexpected. In *Winspear* v. *Accident Insurance Co.* (2) a man had an epileptic fit while crossing a stream, and fell into the stream and was drowned; the fact that the stream was there introduced a fortuitous, unexpected element, which made the whole of the circumstances that brought about the death an accident, just as though, having fallen in a fit, he had been struck by lightning while lying on the ground. In *Lawrence* v. *Accidental Insurance Co.* (3), where a man had a fit on a railway platform and fell off the platform under a passing engine, the presence of the engine was the fortuitous element which brought about the fatal accident. In all the cases cited it was the presence of a fortuitous element which turned a normal condition of affairs into a catastrophe.

VAUGHAN WILLIAMS L.J. I entirely agree, and only desire to express my concurrence in the view that in this case there is an entire absence of the fortuitous element, which is essential to the idea of an accident. The primary and efficient cause of the man's death was, in my judgment, simply the diseased

(1) (1887) 12 App. Cas. 518. (2) 6 Q. B. D. 42.
(3) 7 Q. B. D. 216.

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condition of his body, and not the turning of the wheel of the engine.

Appeal dismissed.

Solicitors for appellant: *Purkis & Co., for Piper & Piper, Bedford.*

Solicitors for respondent: *Halliley & Stimson.*

LLOYD *v.* SUGG & CO.

Appeal from a decision of the judge of the Westminster County Court.

The respondent, a smith in the employ of the appellants, was, on the day of the accident in respect of which compensation was sought, employed in manipulating metal in a forge in the appellants' engineering works; he was holding in his right hand a flatter, the flat head of which was resting on an anvil and was being beaten by a boy with a hammer. While so engaged, the boy with the hammer missed his aim and by accident hit the round rod of the flatter instead of its flat head, and thereby jarred the respondent's hand, which became so swollen as to incapacitate the respondent from work. A doctor who had attended the respondent said that for some time he had suffered from gout, that he had a gouty diathesis, and that in his opinion the swollen condition of the hand was due to gout brought on by the jar, the result of the jar having been to excite the gout in the system. The doctor had given a certificate that the respondent was suffering from a weak hand partially caused by the injury. The learned county court judge awarded the respondent a sum of 15*s.* a week. The employers appealed.

Spencer Bower, for the appellants. There was no evidence on which the judge could find that injury had been caused to the respondent by an accident within the meaning of the Act of 1897; in any event the injury was not caused solely by an accident, but by an accident in conjunction with some other operating cause.

Duckworth, for the respondent, was not called upon to argue.

Dec. 2. A. L. SMITH L.J. As appeals under the Workmen's Compensation Act only lie on questions of law and not upon questions of fact, it would be of great assistance to the Court if the county court judges would in these cases certify their findings of fact; in the present case we have none, but only an award of 15*s.* a week with, as we understand, a verbal statement that the respondent was within the Act. The real point taken on behalf of the appellants is that there was no evidence that the respondent's injury was caused solely by the accident; I think the point a bad one. The evidence is that the respondent was holding this flatter; that it was the duty of the boy to hit the flat end of it as it was held on the anvil; that in consequence of something getting in his eye he made a mis-hit and hit the handle, thereby jarring the respondent's hand, which was considerably injured; the dispute is as to how that injury arose. If the mis-hit had broken the respondent's arm, no question could have arisen. It is said, however, that in order to bring the respondent within the Act it must be proved that the injury was caused solely by the accident; in other words, that if the jar which was caused by the mis-hit operated on a weak or defective hand the case would not be within the Act. The doctor's certificate states that the respondent was suffering from a weak hand caused partially by the injury, and, if that is the case, I cannot see why the respondent should not be entitled to compensation. It cannot be that only a man with a cast-iron hand is within the Act. The appeal must be dismissed.

COLLINS J. I am of the same opinion. The case is a perfectly clear one on the facts, when we once get the fact that there was a jar which caused some injury to the respondent's hand. The jar was caused by the boy with the hammer hitting the rod of the flatter instead of hitting its flat end. That was an accident, and comes exactly within the ordinary description of an accident; the essential element of an accident is present.

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It has been contended that the injury arising from the jar would not be so great but for the gouty diathesis; but this point is absolutely immaterial. There has been an accident, and an injury supervening, and the gouty diathesis is only material as to the amount of the injury. The same principle must be applied in these cases which has always been followed in cases of injury caused by negligence, so far as regards causes contributing to the amount of injury; for instance, in the case of a delicate lady receiving a shock in a railway accident the actual shock would be the same as in the case of a lady in sound health, but the resulting injury would be far greater: in every case the ultimate result differs according to the physical condition of the person at the time of the accident.

VAUGHAN WILLIAMS L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Wynne-Baxter & Keeble.*
Solicitor for respondent: *A. Slater.*

WALKER *v.* LILLESHALL COAL COMPANY, LIMITED.

Appeal from a decision of the judge of the Bow County Court.

The appellant was a workman employed as an engine-fitter by the respondents, who were engineers and iron-founders. About a week before the happening of the injury in respect of which the claim for compensation was made, the appellant had blistered one of his fingers while at his ordinary work. On the day of the injury the appellant was engaged in working at the steam-pipe joints for a machine in the respondents' premises; he had with him a labourer whose duty it was to put red lead and oil upon the joints of the pipes, and the appellant then screwed the different joints together in the required positions. Before beginning this work the appellant saw the respondents' foreman and shewed him his blistered finger, remarking that it was hardly fit for the job; the foreman, however, said that the job must be done, as the machine had to get to work in the afternoon. The appellant then proceeded with the work, and

while engaged upon it the red lead and oil came in contact with his blistered finger, which became greatly inflamed the next day, and in the result was seriously injured. The county court judge was of opinion that, although the appellant had met with serious injury while working in the employment of the respondents, there had been no accident within the meaning of the Act, as the appellant's injury was the result of his working in the ordinary way with the usual materials and appliances for his work. The workman appealed.

Bassett Hopkins, for the appellant. The injury was caused by an accident within the meaning of the Workmen's Compensation Act. The word is used in that Act in a wide sense, and includes injury even by deliberate design, as appears from the language of s. 1, sub-s. 2 (*b*). The definition of "accident" in the Oxford English Dictionary is "anything that happens," and this (excluding cases of serious and wilful misconduct of the workman) is substantially the meaning that should be given to the word in this Act. [He cited *Winspear* v. *Accident Insurance Co.* (1)]

T. Willes Chitty, for the respondents, was not called upon to argue.

Dec. 16. A. L. SMITH L.J. I think that this appeal should be dismissed. The learned county court judge held that the appellant had not received personal injury by accident, and had, therefore, not brought himself within s. 1, sub-s. 1, of the Act; the question for us is whether there had been personal injury by accident within the meaning of that section. The appellant undoubtedly suffered serious injury; his finger had been blistered before, and it was poisoned by its coming in contact, while in its blistered condition, with red lead and oil which was being used in making a joint; he was at the time working in the ordinary way with the usual materials and appliances. We have recently twice considered the question of what is an accident within the meaning of the Workmen's Compensation Act. In *Hensey* v. *White* (2) the workman,

(1) 6 Q. B. D. 42. (2) Ante, p. 481.

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who was inherently weak internally, was starting the wheel of a gas-engine which had been disused during the Christmas holidays and was consequently stiff and difficult to start. The man was working in the ordinary course of his employment, and while so working he ruptured some internal blood-vessels and died. We held in that case that there was nothing fortuitous in what happened; the man was doing his ordinary work in the ordinary way, and there was no element of accident in the case; besides, the county court judge had found as a fact that the man's death was caused by inherent weakness and not by accident. I have read what my brother Collins said in his judgment in that case as to the lack of the fortuitous element which was a necessary ingredient of an accident, and I take this opportunity of adopting what he said and of expressing my entire agreement with it. It was also pointed out by him that in the case of *Winspear* v. *Accident Insurance Co.* (1), which is there cited, the element of the fortuitous existed. In the second case before this Court, *Lloyd* v. *Sugg* (2), we held that a mis-hit was an accident, and that the workman was entitled to compensation for injury to his hand resulting from gout set up by the mis-hit, which was something external to the man himself, and was something fortuitous and unexpected. I agree with the learned county court judge that in the present case there was no accident.

COLLINS L.J. and VAUGHAN WILLIAMS L.J. concurred.

Appeal dismissed.

Solicitor for appellant: *Edward Clarke.*

Solicitors for respondents: *Morgan, Price & Mewburn, for Hargreave & Heaton, Birmingham.*

(1) 6 Q. B. D. 42.

(2) Ante, p. 486.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
Dec. 9.

HENNESSEY *v.* McCABE.

Employer and Workman — Compensation — Employment on, in or about a Factory—Machinery to which any Provision of the Factory Acts applies—Loading from Dock—Steam-winch on Ship in Dock loading from Lighter alongside—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

By s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, "factory . . . . includes any . . . . machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."

By s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts are to have effect "as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory."

A stevedore's labourer sustained injury by an accident while employed on board a steamer lying in dock in loading cargo on to the steamer from a lighter lying alongside; the cargo was lifted out of the lighter and lowered into the hold by means of a steam-winch on the ship's deck:—

Held, that loading from the lighter into the ship was not loading from the dock; that the steam-winch was not a factory, it not being machinery used in the process of loading from a dock, wharf, quay or warehouse within the meaning of s. 23 of the Factory and Workshop Act, 1895, and that the workman was not entitled to compensation under the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Bow County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a stevedore's labourer in the employ of the appellant, a stevedore, was engaged in loading cargo on board the steamship *Barrymore* in the Victoria Docks. The steamer was moored alongside the quay, but the cargo was being loaded from lighters on the other side of the steamer by means of a fall or hoist worked by a steam-winch on the deck of the steamer, and no shore machinery was used during the operation. The respondent was on the steamer receiving casks of pitch, which were lifted by the ship's machinery out of the barge, the man at the steam-winch handling the casks so as to

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bring them over the hatch, and then lowering them into the hold. While in the hold receiving one of the casks that was being lowered the respondent's finger was jammed and badly hurt. The counsel for the appellant submitted that there was no case for him to answer; but the learned judge held that, following the decisions in *Woodham* v. *Atlantic Transport Co.* (1) and *Flowers* v. *Chambers* (2), the respondent was entitled to recover, and accordingly made an award in his favour. The employer appealed.

Ruegg, Q.C., and *Roskill*, for the appellant. The respondent was not at the time of the accident engaged in an employment to which the Act applies. He was not employed in, on or about a "factory" within the meaning of s. 7, sub-s. 1. A ship in dock is not a factory: *Flowers* v. *Chambers* (2); nor was the ship's machinery a factory, for it was not machinery or plant to which any provision of the Factory Acts was applied by s. 23 of the Factory and Workshop Act, 1895. (3)

(1) [1899] 1 Q. B. 15.

(2) [1899] 2 Q. B. 142.

(3) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 7, sub-s. 1, "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . . factory . . . ."

By sub-s. 2, "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . . ."

By 58 & 59 Vict. c. 37 (The Factory and Workshop Act, 1895), s. 23, "The following provisions, namely:

"(i.) Sect. 82 of the principal Act;

"(ii.) The provisions of the Factory Acts with respect to accidents;

"(iii.) Sect. 68 of the principal Act with respect to the powers of inspectors;

"(iv.) Sects. 8 to 12 of the Act of 1891 with respect to special rules for dangerous employments; and

"(v.) The provisions of this Act with respect to the power to make orders as to dangerous machines shall have effect as if—

"(*a*) Every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and

"(*b*) Any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building,

were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person

That section is applied, it is true, to machinery, but only if it comes within one of two categories: it must be either machinery used in the process of loading or unloading to or from a dock, wharf, quay or warehouse, or else machinery worked by mechanical power and temporarily used for work upon a building. The present case obviously does not fall within the second description, and the case of *McNicholas* v. *Dawson* (1) is inapplicable. Neither does it fall within the first description, for the operation was not that of loading from a dock, wharf, quay or warehouse; the cargo was being loaded from a lighter alongside, and this was not loading from a dock within the meaning of the section. The case of *Woodham* v. *Altlantic Transport Co.* (2), which was relied upon by the county court judge, is not in point, for in that case the cargo was being unloaded direct from the ship to the quay. Further, machinery, in order to constitute a factory, must be a factory within a factory; here the ship was not a factory, and it is not possible to apply to the machinery on board the ship the provisions of the Factory Acts.

[They also cited *Hall* v. *Snowden, Hubbard & Co.* (3); *Durrie* v. *Warren & Co.* (4)]

Montague Lush, for the respondent. It is admitted that the machinery must be machinery used in the process of loading or unloading from or to a dock, wharf, quay or warehouse. In the present case the machinery was being used in the process of loading the ship from the dock, which is a process to which certain provisions of the Factory Acts are applied by s. 23 of the Act of 1895. It is conceded that where goods are being loaded by machinery from the quay the case falls within the Act; the same would be the case where goods are being loaded

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who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory."

(1) [1899] 1 Q. B. 773.
(2) [1899] 1 Q. B. 15.
(3) [1899] 2 Q. B. 136.
(4) (1899) 15 Times L. R. 365.

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from a truck standing on the quay, which would be merely a receptacle for the goods, and the loading is none the less a loading from the dock because it is from a receptacle on the water; here the lighter is a receptacle for the goods. If that is not a correct view there cannot, for the purposes of the Act, be a loading from a dock (which includes the water space) in cases where the actual loading is from lighters, although loading from a lighter is in fact the ordinary mode of loading from a dock. The use of the lighter is merely ancillary to the process of loading from the dock. A dock is treated by the Legislature as a separate thing from a quay or a wharf, but if loading from a dock is held to involve the use of the land at its edge, then no meaning can be attached to the word "dock" in the section, and the insertion of the word is wholly nugatory.

Ruegg, Q.C., in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. The question for our decision is whether a steam-winch on board a ship in a dock, which is used for taking in cargo from a lighter lying along the outside of the ship, is a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, for it was upon the ship that the injured man was employed. To decide this question it is necessary to consider once again the effect of the incorporation of the Factory Acts into that Act. None of the decided cases are much in point, except *Flowers* v. *Chambers* (1), in which we held that a ship was not a dock, and *Durrie* v. *Warren & Co.* (2), where we went a long way in the direction in which we are going to-day. What is it that is made a factory for the purposes of the Workmen's Compensation Act? If we look at s. 7, sub-s. 1, of that Act we find that the Act is to apply to employment by the undertakers on, in or about a factory; and sub-s. 2 says that "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Turning to the last-named

(1) [1899] 2 Q. B. 142. (2) 15 Times L. R. 365.

Act, we find in s. 23 that certain specified provisions of the Factory Acts are divided into five classes and are there dealt with, none of which, upon examination, are applicable to a ship. But by that section something is brought within the purview of the Factory Acts which was not previously within them, and it is enacted that these provisions (of course, in cases where they apply) are to "have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word 'factory.'"

The point in the present case is whether the steam-winch on board the ship is machinery worked by steam within the meaning of s. 23 of the Factory and Workshop Act, 1895. What is the steam-winch worked for? Not for unloading to or from a dock, wharf, quay or warehouse, but for nothing else than loading cargo into a ship from a lighter lying on the outside of the ship. It would be straining the language of the statute beyond all bounds if we were to hold that loading from a lighter into a ship was loading from a dock, wharf, quay or warehouse. Loading from one ship to another is not, in my judgment, employment within the Act of 1897. I am unable, therefore, to agree with the decision of the learned county court judge, and think that the employer is entitled to succeed in this appeal.

COLLINS L.J. I am of the same opinion, though the case is one of some difficulty, and I feel great hesitation in differing from the opinion of the learned county court judge upon a point of this kind. The statute, too, is so drawn that it is difficult to discover what it really means, and it is indeed not easy to deal with it upon the broad ground of common sense; I have felt, therefore, a difficulty whether we ought not to give weight to the very ingenious argument on behalf of the respondent. I think that the word "dock" is used in its ordinary

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sense—that is, a place which embraces the land bounding the water space as well as the water itself, and that therefore the Legislature when talking of loading or unloading to or from a dock was not contemplating loading from a barge into a ship, but rather had in its contemplation a process which makes use of the land bounding the water space for the purpose of loading or unloading. I agree, however, that this interpretation renders nugatory certain words in the section, which deals with machinery or plant used in the process of loading or unloading to or from a dock, wharf, quay or warehouse. In that definition "wharf" and "quay" seem to be used in contradistinction to "dock," but in ordinary parlance a dock would include both a wharf and a quay; a dock without those adjuncts probably has never been seen, and therefore the respondent's construction of the section seems logical when he says that "dock" must embrace something which is not a "wharf" or a "quay," and that the section is satisfied by loading or unloading to or from something in a dock without making use of the boundaries of the dock. I do not think, however, that we are driven to adopt that construction, and I think that we ought to give to the expression the same meaning that nine people out of ten would give to it, and to hold that loading or unloading to or from a dock involves the user of the edges of the land surrounding the dock.

The point has been discussed whether this machinery, by means of the complicated definition given by the Act, can be brought within it; but, upon looking once again at the various matters dealt with in the Act, it seems clear that it cannot. The only way in which the Factory Acts can make that a factory which would otherwise not be one is when certain of their provisions are applied to it by the Factory and Workshop Act, 1895; some section must be found in that Act which turns it into a factory, and in the result the question depends wholly on s. 23 of that Act. We find there that the section applies to machinery or plant only under circumstances which do not embrace the circumstances of this case. I agree, therefore, that the respondent is not entitled to compensation under the Act of 1897.

VAUGHAN WILLIAMS L.J. I agree. I think, for myself, that the collocation of the words "dock, wharf, quay, and warehouse" imports either a landing of something from a ship, or a loading of the ship from the land. I cannot think that, even if we were to hold that a ship or barge under these circumstances might be treated as part of a dock, a barge which was in the water of the dock, and from which goods were being discharged which were never landed at all, would be a dock within the meaning of these words; nor, to take the converse case of goods unloaded from a ship into a barge, and never landed at all on any part of the ground adjacent to the dock, would the barge be a "dock." There is an express decision in *Flowers* v. *Chambers* (1) that a ship in dock is not a dock for the purposes of the Act, and it follows that goods may be encased in some receptacle floating in the waters of the dock without the receptacle itself being a "dock" within this section.

It is conceded, and I think necessarily, that though, if goods are loaded by sending them from the dock into a barge floating on the water of the dock, we having something which brings the case within the words of the section (for we have goods starting from a dock or coming therefrom), yet it is impossible to treat the barge as the terminus ad quem the goods are going and to say that the ship in which the goods are put is a part of the dock. I do not mean to say that a barge cannot be so used as to be parcel of a dock, but it is not so in the present case. In my judgment, we ought to say that the process of loading goods from a lighter into a ship is not a process of loading goods to or from a dock, wharf, quay or warehouse within the meaning of the Act.

Appeal allowed.

Solicitor for applicant: *Richard White.*

Solicitors for respondent: *W. Hurd & Son.*

(1) [1899] 2 Q. B. 142.

W. J. B.

C. A.
1900
Feb. 5.

[IN THE COURT OF APPEAL.]

SPENCER *v.* LIVETT, FRANK & SON AND OTHERS.

Employer and Workman—Compensation—Dock—Repairs done to Ship in Dock —"Factory"—"Shipbuilding Yard"—"Premises in which Ships are made, finished or repaired"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93, *Sched. IV., Part II.* (24).

The fact that repairs are being done to a ship in a dock does not make the dock a "shipbuilding yard" within the meaning of the Factory and Workshop Act, 1878, Sched. IV., Part II. (24), and therefore a "factory" within the meaning of s. 7 of the Workmen's Compensation Act, 1897.

APPEAL from an award of compensation under the Workmen's Compensation Act, 1897, by the judge of the Southampton County Court.

The respondent, a workman in the employment of the appellants, Livett, Frank & Son, who were ships' chandlers and also undertook the painting of ships, had sustained injuries in the following manner. A steamship called the *Jelunga*, having discharged her cargo, had been taken into the inner dock at Southampton, and was lying at a jetty there. The appellants had entered into a contract with the owners of the *Jelunga* to paint the inside of the ship. It being necessary for that purpose to discharge the ballast from her holds, a firm of contractors named Aird & Co. were employed to carry out this part of the work. (1)

The ballast, which was stone ballast, was hoisted out of the

(1) The respondent claimed compensation alternatively from the appellants and from Aird & Co. under the circumstances subsequently mentioned in the report, and the appellants claimed indemnity from Aird & Co. It was a matter of dispute in the county court whether the contract for the discharge of the ballast was between the shipowners and Aird & Co. or between the appellants and Aird & Co. As will be seen from the judgment, all questions with regard to the relations between the appellants and Aird & Co. and between the latter and the respondent became immaterial, the Court being of opinion that the respondent was not entitled to compensation under the Act.

ship's holds in turn, as they respectively required to be painted, in an iron bucket by means of a steam-crane on the ship worked by the servants of the shipowners, and was discharged into lighters alongside; and when the painting in each hold was done it was reloaded from the lighters into the ship. The captain having complained during the progress of the work of discharging the ballast of the conduct of the men employed by Aird & Co., and they having consequently struck work, an arrangement was made by which the appellants lent certain of their men, of whom the respondent was one, for the purposes of the work to Aird & Co., who paid the wages of the men so lent. The respondent was engaged in one of the holds of the ship in filling the bucket with ballast, when, in consequence of the crane being set in motion without due warning, the loaded bucket was swung against the respondent, and knocked him down, causing the injury in respect of which he claimed compensation. It appeared that the dock in which the ship was lying was a dock surrounded by warehouses and provided with cranes at intervals along the quays by which ships in the dock were loaded and unloaded. In addition to the painting certain other work and repairs were being done to the internal fittings of the ship in the dock at the time of the accident by a firm named Day, Summers & Co., and one of the witnesses, who acted as manager for the appellants, said that it was a customary thing for that firm to do repairs to ships in that or any other dock. The county court judge found as facts (inter alia) that the respondent when the accident happened was in the employment of the appellants; that they were the undertakers, and had at the time of the accident the actual use and occupation of the dock in which the ship was lying; that it was the usual and ordinary course of business that ships should be repaired in the dock in question; that the ship was in the dock for the purpose, amongst others, of repair, and was being repaired at the time of the accident; and that the ship's engine and crane were being used in the performance of work necessary to be performed for repairing and painting the ship as described in the evidence; and he held that the dock came

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within the meaning of the term "shipbuilding yard" as defined by the Factory and Workshop Act, 1878 (41 Vict. c. 16), Sched. IV., Part II. (24), and therefore was a "factory" within s. 93 of that Act, and within the Workmen's Compensation Act, 1897, s. 7, sub-s. 1. He awarded that the respondent was entitled to 40*l.* compensation as against the appellants, and that the appellants were not entitled to be indemnified by Aird & Co. (1)

Bray, Q.C., and *S. H. Emanuel*, for the appellants. At the time when this case was heard in the county court the case of *Hennessey* v. *McCabe* (2) had not been decided, and the county court judge thought that the decision in *Flowers* v. *Chambers* (3) was distinguishable, because there was no machinery used in unloading the ship in that case. The decision in *Hennessey* v. *McCabe* (2) absolutely covers the present case so far as any point under the Factory and Workshop Act, 1895, s. 23, sub-s. 1, is concerned.

The dock in question was an ordinary dock, in which vessels were loaded and unloaded. Such a dock is clearly not a "shipbuilding yard" within the meaning of the Factory and Workshop Act, 1878, Sched. IV., Part II. (24); and there was

(1) The findings of the county court judge and his judgment are only stated above so far as they are material to the point reported. The case was heard in the county court before the decision in *Hennessey* v. *McCabe*, ante, p. 491. It was contended before the county court judge and he held that the respondent was employed "in or about a . . . . factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 1, because he was employed about machinery used in unloading from or to a dock within the meaning of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 23, sub-s. 1. Part of the findings and the judgment of the county court judge related to this point; but it was admitted, as will be seen, by the counsel for the respondent, that since the decision in the above-mentioned case the award of the county court judge could not be supported on that ground. It will be observed that it became unnecessary in the Court of Appeal to consider the question whether, assuming that the dock was a "shipbuilding yard," the appellants could be deemed to be "the undertakers" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

(2) Ante, p. 491.

(3) [1899] 2 Q. B. 142.

no evidence before the county court judge upon which he was entitled to find that the dock was such a yard.

[The Court then called upon]

Clavell Salter, for the respondent. It must be admitted that the decision in *Hennessey* v. *McCabe* (1) precludes the contention that the respondent was employed in a "factory" within the meaning of the Act, because he was employed about machinery unloading from or to a dock. But it is contended that this dock was a factory within the meaning of the Factory and Workshop Act, 1878, s. 93. Sched. IV., Part II. (24) of that Act defines "shipbuilding yards" as "any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." A dock may come within that definition, as for example a dry or graving dock. The learned judge has found as a fact that this dock was a place where it was usual to repair ships, and therefore a factory within the Act.

[ROMER L.J. The argument for the respondent appears to involve the result that the fact that one vessel in a dock is having some repairs done to her will have the effect of making the Workmen's Compensation Act, 1897, apply to all the other vessels in the dock.]

Bray, Q.C., for the appellants, was not called on to reply.

E. F. Lever appeared for Aird & Co.

A. L. SMITH L.J. The decision of this Court in the case of *Hennessey* v. *McCabe* (1) exactly covers this case as regards the first ground upon which the county court judge based his decision, and so far, therefore, it is clear that his award cannot be supported. But then the respondent's counsel very ingeniously endeavoured to make out that the dock in question in this case was a "factory" within the Workmen's Compensation Act, 1897, s. 7, by bringing in the definition of a "non-textile factory" given by s. 93 of the Factory and Workshop Act, 1878. By that section the expression "non-textile factory" means, among other things, "(2.) also any premises or places named in Part II. of the said schedule (the 4th

(1) Ante, p. 491.

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A. L. Smith L.J.

schedule to the Act) wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Pausing there, I do not see how any manufacturing process can be said to be carried on in this dock. Sched. IV., Part II., of the Act includes "(24.) 'Shipbuilding yards,' that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." It is contended that the inner dock at Southampton is a "shipbuilding yard" within these words, and the question is whether that is so. Primâ facie a shipbuilding yard is a place where ships are built; and, of course, it may also be a place where ships are repaired; but I cannot think that this dock can be said to be "premises in which ships, boats, or vessels used for navigation are made, finished, or repaired" within the meaning of the schedule. An admirable illustration was suggested by my brother Romer as a test with regard to this question. If the argument for the respondent is correct, the result would appear to be that, if one ship in a dock which contains twenty or thirty other ships loading or unloading has some painting or trifling repairs done to her, the dock becomes a shipbuilding yard, and therefore a factory to which the Workmen's Compensation Act, 1897, applies with regard to all the ships in the dock. I do not think that this can be the meaning of the Act. In my opinion this appeal must be allowed.

COLLINS L.J. I am of the same opinion. I only wish to add that I think the conclusion at which we are arriving is strengthened by reference to the language of sub-s. 3 of s. 7 of the Workmen's Compensation Act, 1897, which provides that "a workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard." The effect of the sub-section appears to be equivalent to saying that an accident in a dock to which the Act would not otherwise apply shall be within the Act if the workman is employed in a factory which is a shipbuilding yard. This goes some

way to shew that the Legislature in the use of the term "shipbuilding yard" contemplated something different from a dock.

ROMER L.J. I agree. I think that the Legislature in the definition of a "shipbuilding yard" given by the Act of 1878 must have contemplated premises where something like a business of making, finishing, or repairing ships, boats, or vessels used in navigation is carried on, and not the case of a dock or other premises wherein repairs are only occasionally done to ships. A definition in an Act of Parliament such as this must be looked at by the light of common sense, and it must be remembered that, although it may have been intended to extend somewhat the strict meaning of the term defined, still what the Legislature were primarily dealing with was a "shipbuilding yard."

Appeal allowed.

Solicitors for appellants: *Speechly, Mumford & Rodgers, for C. Lamport, Southampton.*

Solicitors for respondent: *French & Co., for E. R. Ensor, Southampton.*

Solicitor for Aird & Co.: *James Robinson.*

E. L.

C. A.

1899

Dec. 19.

[IN THE COURT OF APPEAL.]

FRANKENBURG *v.* GREAT HORSELESS CARRIAGE COMPANY.

Practice—Company — Shareholder — Fraudulent Prospectus—Action against Company and Directors—Causes of Action—Misjoinder—Separate Relief against Separate Defendants—"Actio Personalis Moritur cum Personâ"—Deceased Director—Legal Personal Representatives, Liability of—Directors' Liability Act, 1890 (53 *&* 54 *Vict. c.* 64), *s.* 3.

Where an action is brought by a shareholder against the company and its directors for relief in respect of an improperly issued prospectus, the fact that the relief claimed against the several defendants may differ in detail is no ground for objection that the action is bad as joining separate causes of action against separate defendants, for in substance there is only one cause of action, namely, the improper issue of the prospectus. Neither is it improper to join in such an action the legal personal representatives of a deceased director alleged to have been a party to the issue of the prospectus.

Whether the maxim "Actio personalis moritur cum personâ" applies in the case of a deceased director who may have incurred liability under s. 3 of the Directors' Liability Act, 1890, *quære.*

Gower v. *Couldridge*, [1898] 1 Q. B. 348, and *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, explained.

THIS action was brought in the Queen's Bench Division by the plaintiff, the holder of 100 10*l.* shares in the defendant company, the Great Horseless Carriage Company, Limited, against the company, its several directors and promoters, and the executors of a deceased director and promoter, claiming as against the company cancellation of the allotment to him of his shares and the return of 1000*l.*, being the sum paid by him thereon, with interest at 5 per cent. per annum; 1000*l.* damages as against the defendants other than the company; and rectification of the company's register of members by the removal of his name therefrom.

The plaintiff applied for his shares on May 18, 1896, upon the faith, as he alleged in his statement of claim, of a prospectus issued by and with the authority of the defendants (other than the company and the executors) and of the deceased

director and promoter. Shortly afterwards the shares were allotted to him, and he paid up the full 1000*l.* thereon. He alleged that the prospectus was false and calculated to mislead, and did in fact mislead him in various material particulars, and that he was induced by its misrepresentations and suppression of material facts to apply for the shares; and he proceeded to specify numerous particulars of the alleged misrepresentations and suppressions, including the suppression of certain contracts said to have been entered into before the issue of the prospectus. The plaintiff then went on to allege (paragraph 5) that the defendants (other than the company and the executors) and the deceased director and promoter, and each of them, knowingly and fraudulently made the false representations and were guilty of the suppressions referred to for the purpose of misleading persons reading the prospectus and wrongly inducing them to apply for shares; also (paragraph 6) that (under s. 3 of the Directors' Liability Act, 1890) the defendants had no reasonable ground for believing, and did not believe, the statements complained of, or any of them, at the time the prospectus was issued, or at any time up to the allotment to the plaintiff of his shares; and (paragraph 7) that (under s. 38 of the Companies Act, 1867) the prospectus was knowingly issued by the defendants (other than the company and the executors) and the deceased director and promoter without disclosing the contracts above referred to, and of which the plaintiff said he had had no notice; also that the defendants the executors had benefited by the wrongful act of their testator.

Subsequently the question was raised on behalf of several of the defendants that the plaintiff's claim improperly combined different causes of action against different defendants; and eventually Channell J., on December 1, 1899, made several orders in chambers dismissing the action as against the objecting defendants unless the plaintiff within ten days elected to amend the writ and statement of claim by striking out the names of the company and of the executors of the deceased director as defendants.

The plaintiff appealed.

The appeal was heard on December 19, 1899.

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C. A. Russell, Q.C., and *Eustace Smith*, for the plaintiff. It appears that the learned judge below thought himself bound by *Gower* v. *Couldridge* (1) to hold that this action was bad in form in that it alleged different causes of action against different defendants; but that case has really no application, for there separate liabilities were alleged in respect of distinct and separate torts, whereas here the foundation of the action alleged is the same against the whole of the defendants, namely, the issue of a fraudulent prospectus. As regards the defendants the executors the cause of action is the same, for it will be shewn at the trial of the action that their estate has benefited by the tort of their testator.

[They were stopped by the Court.]

Lawson Walton, Q.C., and *A. Sims*, for the defendant company. Paragraphs 5, 6, and 7 of the statement of claim allege three separate causes of action: (1.) against the company, for rescission of the contract to take shares, on the ground of misrepresentation by the directors; (2.) as against the directors, two distinct causes of action, being (*a*) the allegation in an ordinary claim for deceit, and (*b*) damages for breach of duty; and (3.) as against the executors of the deceased director, that their estate has benefited by the fraud of their testator. The rule is clear that separate causes of action cannot be united in one writ against separate defendants, however convenient that may be and however connected the causes of action may be by reason of the facts out of which they arise: *Smurthwaite* v. *Hannay* (2); *Thompson* v. *London County Council*. (3)

Pollard, for the first of the defendant directors. Paragraphs 5, 6, and 7 charge fraud in issuing the prospectus, but there cannot be a fraudulent prospectus as against the company: untrue statements there may be, and that may be a ground, as against the company, for rescission and nothing else. Therefore those paragraphs shew no cause of action as against the company. It is not sufficient to say that the issue of the improper prospectus is a common point against all the defendants. That was the case in *Gower* v. *Couldridge* (1),

(1) [1898] 1 Q. B. 348. (2) [1894] A. C. 494.
(3) [1899] 1 Q. B. 840.

and yet the Court held that that was not a sufficient ground for maintaining the action. It is not a question here of alternative grounds of relief or of doubt as to who are the proper parties to be sued, as in *Honduras Ry. Co.* v. *Tucker*. (1)

Rawlinson, Q.C., *Brooke Little*, *Disturnal*, and *H. J. Turrell*, for the other defendant directors.

Bremner, for the defendants the executors of the deceased director. If this statement of claim discloses one cause of action against all the defendants, the plaintiff is entitled to go on; but if it discloses separate causes of action against separate defendants, then he is not. A "cause of action" has been defined as "every fact which is material to be proved to entitle the plaintiff to succeed": per Brett J. in *Cooke* v. *Gill*. (2) As regards the executors, the plaintiff must first prove fraud on the part of their testator, and, secondly, that his estate has benefited by that fraud. Therefore, to constitute a cause of action against the executors the plaintiff must allege fraud and benefit to their estate. Thus the cause of action as against them is different from the cause of action as against the other defendants. Now the action as against the deceased director has gone, for "Actio personalis moritur cum personâ," so that the only cause of action remaining against the executors is that their estate has benefited, and that must be proved. The issue of a fraudulent prospectus and liability under the Directors' Liability Act, 1890, are entirely different causes of action: *Gower* v. *Couldridge*. (3) Again, s. 38 of the Companies Act, 1867, which imposes a liability for not disclosing every contract by or on behalf of the company in the prospectus, raises a separate cause of action. The cause of action as against the company is innocent misrepresentation, whereas the cause of action as against the directors is liability under the Directors' Liability Act, 1890, and s. 38 of the Companies Act, 1867—causes of action therefore quite distinct from that against the company. This statement of claim is not framed in accordance with the rules of procedure: *Sadler* v. *Great Western Ry. Co.* (4)

C. A. Russell, Q.C., in reply.

(1) (1877) 2 Ex. D. 301.
(2) (1873) L. R. 8 C. P. 107.
(3) [1898] 1 Q. B. 348.
(4) [1896] A. C. 450.

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[LINDLEY M.R. What do you say as to the action against the executors?]

An action such as this under the Directors' Liability Act, 1890, does not come within the maxim "Actio personalis moritur cum personâ." The cause of action against all three classes of defendants, the company, the directors, and the executors of the deceased director, is one and the same, namely, the issue of a fraudulent prospectus, though it may be that the individual liabilities for the wrong may be found to differ.

LINDLEY M.R. I confess I am very much surprised at finding an action in this form summarily dismissed upon the technical grounds which have been urged before us. Ever since I have known anything about companies, actions in this form have been common enough, and have been adjudicated upon perpetually; and if these orders were to stand, the practice, certainly of the Chancery side of the High Court, would be revolutionised, and substantial justice would be sacrificed to a wretched technicality.

Now let us see what this action is. It is an action brought by a gentleman against a company and its directors—I say nothing at present about the executors of a deceased director—for what? Simply for relief to which he is entitled in respect of an improperly issued prospectus. That is the foundation of his claim. His relief is various in detail; but that is one cause of action in the wide sense, apart from all technicalities. He says, "You have all, both company and directors, been guilty of a breach of your duty or obligation to me in issuing this prospectus to me." What conceivable injustice or irregularity is done in bringing one action against all those who have done that which he complains of? It is true that, as against the company, he does not ask for damages; but he asks for rescission of contract, because by rescission he will get all he wants as against the company—that is, he will get rid of his shares and get his money back. The company may, however, be in such a state of impecuniosity that it cannot give him his money back, and therefore he asks for damages against the directors. That, no doubt, is a different species of

relief; but to say there should be as many actions as there are classes of defendants would be to render these actions unmaintainable. Just consider what the result would be. The aggrieved shareholder would have to bring perhaps half-a-dozen actions, proving in each action precisely the same facts, with one or two additional facts, to fix each particular defendant. To say those defendants cannot be joined because of some technical difficulty about joining causes of action is, to my mind, a novelty which we ought to discourage. In substance the shareholder has one grievance, call it a cause of action or what you like; and in substance he has one complaint, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of that one thing which they have done, namely, the issuing of a prospectus. I confess I am startled and surprised at finding that there should have been any difficulty about the matter; and I cannot help thinking, if this action had been brought in the Chancery Division, we should never have heard anything of this controversy.

In my opinion the learned judge has misapplied the case of *Gower* v. *Couldridge*. (1) I do not quarrel with that case at all: I think it is perfectly intelligible. In that case there were separate liabilities in respect of distinct and separate torts. First of all, there was a conspiracy by two of the defendants, and then the issue of an improper prospectus by the others. The Court said, "You cannot join those two causes of action, but you can elect if you like." The issue of the prospectus was not the common ground of action against the whole of the defendants. I do not say the prospectus had nothing to do with it, but there were distinct and separate causes of action in the narrow sense alleged there. In the wide sense here, I repeat, the whole case turns upon the issue of the prospectus, and there is nothing more than a complaint against a number of people who have done the plaintiff one wrong by issuing a prospectus which they had no right in point of law to issue. That is quite enough for the present purpose; and if we look into the practice, it would, I repeat, be a startling novelty and

(1) [1898] 1 Q. B. 348.

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it would be a most deplorable thing for our practice and procedure if such actions as these could be summarily disposed of and stopped in this way. Certainly we have no authority for doing anything of the kind. There is no single case which comes anywhere near it, and I will not be the first to undo and unsettle what has been the established practice for years.

Now, as regards the executors of one deceased director, there is a little difficulty, although striking them out as defendants is not the way to deal with it. The proper way to deal with it is to let the action be tried out, and see whether those defendants are liable under the Directors' Liability Act, 1890. I do not say whether they are or are not; but it may be that there is a statutory liability to which the maxim "Actio personalis moritur cum personâ" does not apply—in which case they would be liable just as the other directors who are alive, but of course out of the assets of their testator. On that I say no more. I leave that to be discussed hereafter.

On the whole I think all the orders ought to be discharged, and the appeal allowed.

ROMER L.J. I agree. In substance in this case there is but one cause of action against all the defendants. The cause of action—dealing with the matter as one of substance, and it ought to be so dealt with—was this: a prospectus was issued which contained improper statements, and which had improper omissions in it. It was issued on behalf of the defendant company by all its directors, who constitute the other defendants in this action. That was the cause of action. The remedy given to the plaintiff who applied for shares and had shares allotted to him on the faith of that improper prospectus is different as against the several defendants, but not so much in substance as in form. As against the company his remedy is rescission and repayment of the purchase-money with interest. As against the directors who issued the prospectus his remedy is one of damages, because the prospectus as against them was fraudulent, and he may not by the relief against the defendant company get full compensation by way of damages for the injury he has sustained. It is true that the Companies

Act, 1867, and the Directors' Liability Act, 1890, are relied upon by the plaintiff in support of his case; but that is not sufficient to constitute any real different cause of action in respect of the action as against the company and of the action as against the directors.

Sect. 38 of the Companies Act, 1867, makes the prospectus, if containing certain omissions, improper as against the company. It makes it under certain circumstances fraudulent as against the directors, but in both cases the plaintiff can rely on s. 38 when he deals with the prospectus which induced him to take shares, both as against the company and as against its directors. Sect. 3 of the Directors' Liability Act, 1890, only makes the directors liable on the prospectus on certain grounds, and those grounds are also grounds on which the plaintiff must rely in asking for rescission as against the company. Really this action is one which in substance has been common, originally in the Chancery Court and, since the Judicature Acts, in the Chancery Division, for I should be sorry to say how many years; it is merely one of the well-known actions against principal and agent for improper conduct of the agent acting on behalf of the principal, and affording ground of complaint both against the principal and against the agent, though the exact relief obtainable against the principal may be different from the exact relief obtainable against the agent. Such actions are common both at common law and in equity, and I may refer, by way of example only, to such a case: *Heatley* v. *Newton*. (1)

With regard to the peculiar position of the executors of the deceased director, no doubt a question may arise whether they or their estate are liable for the acts of the deceased; but that question is not immediately before us. If they are liable, they are liable on practically and substantially the same grounds of action on which the living directors are liable, and I do not think this question as to whether executors are or are not liable as representing the estate of the deceased director ought to be peremptorily cut short on the present application. I should think the plaintiff ought to have the liberty of considering that question and to try it if necessary; it may be one requiring

(1) (1881) 19 Ch. D. 326.

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Romer L.J.

careful consideration. Certainly the ground on which the summonses in this case have been acceded to by Channell J. does not cover the special circumstances of such a case as that raised by the directors.

With regard to the cases cited as supporting the view of the respondents to this appeal, I will only say, with regard to *Gower* v. *Couldridge* (1), that that was merely a case illustrating the principle that if you have a cause of action against A. and B. for a tort X., and you have quite a separate cause of action against B. for tort Y., then you cannot in one action bring claims in respect of both torts X. and Y. against A. and B. That principle is a clear one, and the case of *Gower* v. *Couldridge* (1) merely carried it out. With regard to *Thompson* v. *London County Council* (2), that again only illustrates another principle which has no application to the case before us. That principle is this: if you have suffered a wrong it may be that A. is the person who has committed it, in which case he is liable; but perhaps you are not certain that it may not be B. who has committed it, and if so B. is liable: as between A. and B. they are strangers to each other in the matter; and, then, because you cannot ascertain whether A. or B. was the person committing the wrong, you cannot bring the action for damages against A. and B. jointly.

It appears to me, therefore, that this appeal ought to succeed.

Appeal allowed.

Solicitors: *G. Trenam, for Addleshaw, Warburton & Co., Manchester; Ward, Bowie & Co.; Church, Rendell & Todd; Steadman & Van Praagh; Fladgates; Beyfus & Beyfus; Ashurst, Morris & Co.*

(1) [1898] 1 Q. B. 348.

(2) [1899] 1 Q. B. 840.

G. I. F. C.

VARLEY *v.* WHIPP.

1900
Feb. 8.

Sale of Goods—Contract—Sale by Description—Implied Condition—Acceptance —Passing of Property—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 13, 17, 35.

The expression "contract for the sale of goods by description," in the Sale of Goods Act, 1893, s. 13, applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller.

The plaintiff agreed to sell and the defendant to buy a reaping machine, which the defendant had never seen, and which the plaintiff stated to have been new the previous year, and to have been used to cut only fifty or sixty acres. The machine was delivered, and shortly afterwards the defendant wrote complaining that it did not correspond with the plaintiff's statements. After some further correspondence the defendant returned the machine.

In an action to recover the price:—

Held, that there was a contract for the sale of goods by description, within the meaning of the Sale of Goods Act, 1893, s. 13, and therefore, by that section, there was an implied condition that the goods should correspond with the description, that there had been no acceptance of the machine by the defendant, within the meaning of s. 35, that the property had not passed to the defendant, within the meaning of s. 17, and the plaintiff was not entitled to recover.

Appeal by the defendant from the judgment of the judge of the county court of Yorkshire holden at Huddersfield, in an action brought to recover 21*l.* as the price of a second-hand self-binder reaping machine. The material facts proved at the trial were as follows. Near the end of June, 1899, the plaintiff and the defendant met in Huddersfield, when the plaintiff offered to sell to the defendant for 21*l.* a second-hand self-binder reaping machine, which the plaintiff said was then at Upton, and he also said that it had been new the previous year, and had only been used to cut fifty or sixty acres. The plaintiff was to put the machine on the railway to send to Beverley, and the defendant was to pay the carriage. The defendant had not then seen the machine. The defendant said he would have the machine. The machine was not then the plaintiff's property, but he bought it immediately afterwards for 18*l.* On June 28 the plaintiff put the machine on the railway to send to Beverley. On July 2 the defendant wrote a

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letter to the plaintiff, as follows: "I have had a look at the 'self-binder' you sent me, but it is not what I expected; it is a very old one, and has been mended, and you told me that it had only cut about fifty acres, and was practically new. I think you must never have seen it. It will be no use to me, as I don't care about old things, and especially machinery, but I shall be at Huddersfield this week . . . . where I shall be pleased to see you." After some further correspondence the defendant, on August 14, returned the machine, and the plaintiff brought this action to recover the price. At the trial the judge of the county court held that the contract was for sale by description, and that the defendant could only treat the misdescription as a breach of warranty, but not as a ground for rejecting the machine, and gave judgment for the plaintiff for the amount claimed. The defendant appealed.

Danckwerts, Q.C., for the defendant. There is no contract of sale on which the plaintiff is entitled to recover. By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13, "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description." Here the plaintiff described the machine to the defendant, who had never seen it, but agreed to buy it, relying on the description. It did not correspond with the description, and there was a breach of the implied condition that it should. This is different from a mere breach of warranty, and invalidates the contract. The property never passed within the meaning of s. 17. By s. 34, sub-s. 1, "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." The defendant never had an opportunity of examining the machine until it was delivered to him, and after that he did nothing that could amount to an acceptance, within the meaning of s. 35. (1)

(1) By s. 35, "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods

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[CHANNELL J. The question seems to be, whether there must be a rejection in order to prevent the property from passing, or whether it is enough that there is no acceptance. The letter of July 2 is not an acceptance.]

It may be read as amounting to a rejection, but a rejection is unnecessary unless the goods have been retained after the lapse of a reasonable time. The Sale of Goods Act has not altered the law as to this question, and before the Act the purchaser would not have been bound under such circumstances: *Azémar* v. *Casella* (1); *Grimoldby* v. *Wells*. (2)

C. C. Scott, for the plaintiff. The decision of the county court judge was right. This is not a contract for the sale of goods by description, within the meaning of the Sale of Goods Act, 1893, s. 13. It is a contract for the sale of a particular machine, coupled with certain statements with regard to the machine, which can, at the most, amount only to a collateral warranty, so that, whatever his remedy may be with respect to the statements, the purchaser is bound by his contract. It is a contract for the sale of "specific goods," which, by s. 62, "mean goods identified and agreed upon at the time a contract for sale is made." Sect. 13 applies only to the case of a sale of unascertained goods. There has been no rejection or refusal to accept. The property passed to the defendant at the latest when the machine was put on the train for transmission to him: s. 18, r. 5 (2.) The result is that he has bought the machine, and accepted it within the meaning of s. 35, and is liable to pay the price agreed upon.

Danckwerts, *Q.C.*, replied.

CHANNELL J. I am of opinion that this appeal ought to be allowed. The case turns on a fine point, namely, whether the words used by the seller with regard to the machine were part of the description, or merely amounted to a collateral warranty. If the property in the machine passed prior to July 2, nothing

have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

(1) (1867) L. R. 2 C. P. 431, 677.

(2) (1875) L. R. 10 C. P. 391.

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that the buyer could do afterwards would divest it. The question is, did the property pass? The machine which was to be sold had never been seen by the buyer, and it was not the property of the seller at the time. It was described as being at Upton, as being a self-binder, as being nearly new, and as having been used to cut only about fifty or sixty acres. All these statements were made with regard to the machine, and we have to consider how much of these statements was identification of the machine, and how much was mere collateral warranty. If a man says that he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year old horse in the last stall, and there is a horse in the stall, but it is not a four-year old, the property would not pass. But if he says he will sell a four-year old horse, and there is a four-year old horse in the stall, and he says that the horse is sound, this last statement would only be a collateral warranty. The term "sale of goods by description" must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present, where the buyer has never seen the article sold, but has bought by the description. In that case, by the Sale of Goods Act, 1893, s. 13, there is an implied condition that the goods shall correspond with the description, which is a different thing from a warranty. The most usual application of that section no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description. Then the sale being a sale by description, when did the property pass, if it did not pass when the bargain was made? The section of the Sale of Goods Act dealing with the passing of the property is s. 17, by which "(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances

of the case." It is impossible to imagine a clause more vague than this, but I think it correctly represents the state of the authorities when the Act was passed. Sect. 18 does not apply; the only clause in that section which could possibly apply would be rule 1, but I do not think that this was "an unconditional contract for the sale of specific goods." Then when did the property pass? Not when the machine was put on the railway, for the vendor could not make the property pass by putting on the railway that which did not fulfil the implied condition. The earliest date therefore at which the property could be said to pass would be when the machine was accepted by the purchaser. But it never was accepted. I am doubtful whether the letter of July 2 could be treated as amounting to a rejection, but the purchaser certainly did not accept the machine by that letter, and therefore the property never had passed. The result is that the defendant is entitled to judgment, and the appeal must be allowed.

BUCKNILL J. I am of the same opinion. The county court judge has found that there was a sale by description, and I think that finding is right. The machine was sold as a self-binder, which was then at Upton, was nearly new, and had only been used to cut fifty or sixty acres. Was that a collateral warranty, or was it the description of the article intended to be sold? I am of opinion that it was the description, and that there was a contract for sale by description, within the meaning of s. 13 of the Sale of Goods Act. The machine was put on the railway, and got to the defendant's place of business. He could then accept or reject it. He wrote the letter of July 2, by which, though possibly he did not reject the machine, certainly he did not accept it. I am of opinion that the appeal must be allowed, and judgment given for the defendant.

Appeal allowed.

Solicitors for plaintiff: *Van Sandau & Co., for C. H. Marshall, Huddersfield.*

Solicitors for defendant: *Rowcliffes, Rawle & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

C. A.
1900
Feb. 22.

[IN THE COURT OF APPEAL.]

THE BRENDA STEAMSHIP COMPANY, LIMITED *v.* GREEN.

Ship—Charterparty—Construction—"Cargo to be taken from Alongside at Charterers' Risk and Expense"—"Any Custom of the Port notwithstanding"—Extent of Exclusion of Custom.

By a charterparty a cargo of timber was to be shipped at a Baltic port and delivered at the Surrey Commercial Docks, London. The charterparty contained a clause, "The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port notwithstanding":—

Held, that the exclusion of the custom of the port related to the whole clause, and that the shipowners were therefore only bound to deliver over the ship's rail, and were not bound by any custom of the port of London requiring a shipowner to do work outside the ship.

APPEAL from a judgment of Mathew J. at the trial of the cause without a jury.

The action was brought by the owners of the steamship *Brenda* to recover from the charterers a part of the cost of unloading the vessel. The charterparty upon which the question arose was the Chamber of Shipping Wood Charter (Scandinavia and Finland), 1898, and by it the *Brenda* was to proceed to certain Baltic ports and there load a cargo of timber, and, being so loaded, proceed to the Surrey Commercial Docks, London, and deliver the same. The names of the ports of loading and discharge were written into the charterparty, which contained the following printed clause: "The cargo shall be supplied as fast as required by steamer, and be received at port of discharge as fast as steamer can deliver, during the ordinary working hours of the port. . . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port to the contrary notwithstanding."

The plaintiffs incurred expense in discharging the vessel, and they claimed in this action so much of the sum that they had expended as was attributable to the cost of discharging from

the ship's rail into barges and on to quay, which had been paid by them under protest to the stevedores who discharged the ship.

The plaintiffs made an admission that, in the absence of any provision in the charterparty negativing it, there is a custom in the port of London with regard to timber ships which enlarges the ordinary meaning of "alongside" and "delivery" by requiring the shipowner to do work outside his ship in placing the timber into barges or on to quay, but that such custom does not require him to stow the timber on the barge or to stack it on the quay.

The learned judge held that the terms of the charterparty excluded the custom, and gave judgment for the plaintiffs.

The defendants appealed.

English Harrison, *Q.C.*, and *Leck*, for the defendants. By the custom of the port of London there is no delivery till the timber is in the barge or on the quay. This charterparty does not interfere with that obligation on the shipowner, for it does not say that in no case shall the custom of the port of discharge apply, but only that no custom is to be applicable which affects the risk and expense of taking the cargo from alongside—that is, taking it after it has been placed in the barge or on the quay.

[They cited *Aktieselkab Helios* v. *Ekman & Co.* (1), *Stephens* v. *Wintringham* (2), and *The Nifa*. (3)]

Scrutton, for the plaintiffs, was not called on.

A. L. SMITH L.J. This is an appeal from a judgment of my brother Mathew which was in my opinion perfectly right. The question arises on a charterparty of which the printed form mentions no ports. What the parties have done is, they have filled in ports in the Baltic as loading ports, and the Surrey Commercial Docks, in the port of London, as the place of discharge. Apart from custom, a ship has delivered her cargo when it is put over the rail, and, as has been frequently pointed out, that is a joint operation of shipowner and charterer.

(1) [1897] 2 Q. B. 83. (2) (1898) 3 Com. Cas. 169.
(3) [1892] P. 411.

C. A. 1900

BRENDA STEAMSHIP COMPANY v. GREEN.

A. L. Smith L.J.

That being the ordinary rule, this charterparty says that the cargo is to be brought to—that is, at the loading port—and taken from—that is, at the discharging port—alongside at charterers' risk and expense, "any custom of the port to the contrary notwithstanding." The meaning of this is plainly that the clause of the charterparty is to be read irrespectively of any custom, and I cannot doubt that the concluding words cover the whole preceding clause. If so, the duty of the charterers was to take the cargo from alongside—that is, when it was offered to them over the ship's rail. I only wish to add that cases which arise as to the circumstances in which a custom is applicable have no bearing on this case, in which the custom has been eliminated by the terms of the charterparty.

The appeal will be dismissed.

COLLINS L.J. I am of the same opinion. When it is conceded that, apart from custom, taking delivery from alongside means taking delivery over the ship's rail, the obligation on the shipowner cannot be extended without importing a custom of the port of discharge. If such a custom is excluded, and that, in my opinion, is the effect of this clause of the charterparty, the ordinary meaning of the words "deliver" and "alongside" must be adopted, and not the extended meaning sought to be put on those words by the defendants.

ROMER L.J. I agree. This clause of the charterparty means, in my judgment, that in considering the obligations of the shipowner and the charterer as to loading or unloading, the customs of the ports of loading or discharge respectively are to be disregarded. The matter would then be governed by the general law, which has been settled by a long series of cases which shew that the plaintiffs' duty was complete when they delivered over the ship's rail. They are, therefore, entitled to recover the expenses incurred after that point, which properly fell on the defendants.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Lowless & Co.*

A. M.

THE QUEEN *v.* DE GREY.

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Feb. 6.

Poor-rate—Procedure—Appeal—Notice of Appeal—Quarter Sessions—Jurisdiction—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 33.

By the Poor Relief Act, 1743, s. 4, any person aggrieved by any poor-rate may appeal to quarter sessions, "giving reasonable notice to the churchwardens or overseers."

By the Local Government Act, 1894, s. 33, sub-s. 1, "The Local Government Board may, on the application of the council of any municipal borough . . . . make an order conferring on that council . . . . any powers, duties, or liabilities of overseers."

An order was made under this section transferring to the council of a borough the powers, duties, and liabilities of the overseers with respect to appeals in respect of the poor-rate.

The recorder of the borough decided that he had no jurisdiction to hear an appeal to quarter sessions against a poor-rate, on the ground that notice of appeal had not been given to the town council:—

Held, that notice to the town council was not a condition precedent to hearing the appeal, that the recorder had jurisdiction, and a mandamus commanding him to hear the appeal granted.

Reg. v. *Kent Justices*, (1899) 80 L. T. (N.S.) 622, disapproved and not followed.

ARGUMENT of an application for a writ of mandamus.

The King's Lynn Docks and Railway Company appealed against two rates for the relief of the poor of the parish of St. Margaret's, in the borough of King's Lynn. The appeals came on for hearing before the court of quarter sessions for the borough, when proof was given of service of notices of the appeals on the clerk to the assessment committee, and on the overseers and churchwardens. Counsel for the respondents then objected to the jurisdiction of the recorder to hear the appeals, on the ground that there was no proof of service of the notices on the town council for the borough of King's Lynn, as the powers, duties, responsibilities, and liabilities of the overseers had been transferred by an order of the Local Government Board, under s. 33 of the Local

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Government Act, 1894, to the town council (1), and the case of *Reg.* v. *Kent Justices* (2) was referred to. The recorder held that he had no jurisdiction to hear the appeals, as conditions precedent had not been complied with, and dismissed them.

An order nisi was afterwards obtained calling on the recorder to shew cause why a writ of mandamus should not issue

(1) The following is the material part of the order of the Local Government Board dated April 7, 1897. After reciting s. 33, sub-ss. 1, 3, of the Local Government Act, 1894, and an application under sub-s. 1 by the council of the borough of King's Lynn, the order proceeded: "We hereby transfer to the council of the said borough the powers, duties, and liabilities, of the overseers of each parish wholly comprised within the borough with respect to appeals or objections by the overseers in respect of the valuation list, or appeals in respect of the poor-rate, or county rate, or the basis of the county rate."

By the Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 4, persons aggrieved by any rate or assessment for the relief of the poor may appeal to quarter sessions, "giving reasonable notice to the churchwardens or overseers of the poor."

By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6, sub-s. 1, "Upon the parish council of a rural parish coming into office, there shall be transferred to that council . . . . (*b*) The powers, duties, and liabilities of the churchwardens of the parish" [with certain exceptions not here material] . . . . "(*c*) The powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of the parish with respect to (i.) . . . . appeals in respect of the poor-rate."

By s. 33, sub-s. 1, "The Local Government Board may, on the application of the council of any municipal borough, including a county borough, or of any other urban district, make an order conferring on that council, or some other representative body within the borough or district, all or any of the following matters, namely, the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers, any powers, duties, or liabilities, of overseers, and any powers, duties, or liabilities, of a parish council, and applying, with the necessary modifications, the provisions of this Act with reference thereto."

By s. 52, sub-s. 5, "All enactments in any Act, whether general or local and personal, relating to any powers, duties, or liabilities, transferred by this Act to a parish council or parish meeting from justices, or the vestry, or overseers, or churchwardens and overseers, shall, subject to the provisions of this Act, and so far as circumstances admit, be construed as if any reference therein to justices, or to the vestry, or to the overseers, or to the churchwardens and overseers, referred to the parish council or parish meeting as the case requires, and the said enactments shall be construed with such modifications as may be necessary for carrying this Act into effect."

(2) 80 L. T. (N.S.) 622.

commanding him to enter continuances and to proceed to hear and determine the merits of the two appeals.

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Marshall, Q.C., and *R. Cunningham Glen* (*A. M. Talbot* with them), shewed cause. The recorder was right in holding that he had no jurisdiction to hear the appeals. He was bound so to hold by the judgment in the case which was called to his attention: *Reg.* v. *Kent Justices* (1); and that decision is also binding on this Court. The only difference between that case and the present is, that there the notices should have been served on the parish council, whereas in the present case there is no parish council; but by the order of the Local Government Board the town council of the borough of King's Lynn is placed in the position of a parish council, and therefore service upon that body was a condition precedent to the hearing of the appeals.

Littler, Q.C., and *F. K. North*, in support of the order nisi. Service on the town council was not a condition precedent to the hearing of the appeals. The judgment in *Reg.* v. *Kent Justices* (1) appears to have been given under a misapprehension, and ought not to be followed. It is remarkable that in that case only one of the three decisions in *Reg.* v. *Eyre* (2), (3), (4), (the first (2)) appears to have been brought to the notice of the Court. Other decisions also, which would have been very much in point, were not referred to: *Shrewsbury and Hereford Railway* v. *Leominster Overseers* (5); *Liverpool Gas Co.* v. *Everton* (6); *Reg.* v. *Surrey Justices.* (7) The Poor Relief Act, 1743, provided for giving notice to the overseers, but that did not create any power, duty, or liability, on the part of the overseers, which can be transferred by the Local Government Act, 1894. There is no provision in s. 33 of the Local Government Act, 1894, for publication of the orders of the Local Government Board, and therefore those

(1) 80 L. T. (N.S.) 622.
(2) (1856) 6 E. & B. 992; 26 L. J. (M.C.) 14.
(3) (1857) 7 E. & B. 609; 26 L. J. (M.C.) 121.
(4) (1857) 7 E. & B. 619; 26 L. J. (M.C.) 125.
(5) (1857) 21 J. P. 149.
(6) (1871) L. R. 6 C. P. 414.
(7) (1880) 6 Q. B. D. 100.

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orders cannot affect the rights of persons who were no parties to them, and who may be ignorant of their existence or contents, as it appears from the affidavits the appellants in the present case were. To hold otherwise would be to allow the Local Government Board to take away or seriously affect, by an unpublished order, the right of appeal expressly conferred by the Poor Relief Act, 1743. [The following authorities were also referred to: *Rex* v. *Wilts Justices* (1); *Reg.* v. *Cambridgeshire Justices* (2); *Reg.* v. *Lancashire Justices* (3); *Reg.* v. *Skircoat, Inhabitants* (4); *Reg.* v. *St. Mary Magdalene, Bermondsey, Overseers* (5); *Reg.* v. *White.* (6)]

CHANNELL J. We have both come to the conclusion that the order nisi which has been granted in this case ought to be made absolute. The real question which has to be determined is, whether the decision of Darling J. and myself in the case of *Reg.* v. *Kent Justices* (7) was right or not. The application for the order nisi in the present case was made to Darling J. and myself, the same Court as decided *Reg.* v. *Kent Justices* (7), and I have his authority for saying that he agrees with the view which I now take as to that decision. Two points were decided in that case. In the first place we decided that by the operation of the Local Government Act, 1894, in all cases relating to poor-rates, the parish council, where there is one, was substituted for the overseers, and therefore, by s. 52, sub-s. 5, of the Local Government Act, the word "overseers" in 17 Geo. 2, c. 38, s. 4, was to be read as "parish council." I have some doubt now as to whether that was right or not, but I am not prepared to say that we were wrong in so holding. The second point which we decided was that giving notice to the parish council was a condition precedent to the hearing of the appeal. I am clear now that the decision as to this point was given per incuriam. It arose from our attention not

(1) (1828) 8 B. & C. 380.
(2) (1850) 19 L. J. (M.C.) 130.
(3) (1857) 8 E. & B. 563; 27 L. J. (M.C.) 161.
(4) (1859) 2 E. & E. 185; 28 L. J. (M.C.) 224.
(5) (1884) 14 Q. B. D. 351.
(6) (1884) 14 Q. B. D. 358.
(7) 80 L. T. (N.S.) 622.

having been called to the fact that there is a difference in this respect between an appeal from a poor-rate under 17 Geo. 2, c. 38, and other appeals.

Our attention appears to have been called to only one of the three cases of *Reg.* v. *Eyre* (1), (2), (3), and the decision referred to is not in point. (1)

Also there are three strong authorities, which have a material bearing on the question for decision, to which our attention was not called in *Reg.* v. *Kent Justices.* (4) These are *Shrewsbury and Hereford Railway* v. *Leominster Overseers* (5), *Liverpool Gas Co.* v. *Everton* (6), and *Reg.* v. *Surrey Justices.* (7) Under these circumstance I cannot regard the decision in *Reg.* v. *Kent Justices* (4) as binding on us in the present case, and possibly even a Court consisting of two judges, neither of whom had been a party to that decision, might not be bound by it. That being so, we think that the recorder had jurisdiction to entertain the appeal, even if no right notices were given.

No specific application was made to the recorder to enter and respite the appeal, and in many cases that omission would be fatal, and would be a ground for refusing a mandamus; but in the present case the application was unnecessary, as it had been held in *Reg.* v. *Kent Justices* (4) that such an application could not be entertained. It might be possible to distinguish *Reg.* v. *Kent Justices* (4) on the ground that it was a decision under s. 52, sub-s. 5, of the Local Government Act, and that section refers to a transfer under the Act, and not under an order of the Local Government Board. But I prefer to hold that our decision was wrong on the other point. No doubt the recorder was right in acting as he did when the decision in *Reg.* v. *Kent Justices* (4) was brought to his notice; but, for the reasons which I have given, we have come to the conclusion

(1) 6 E. & B. 992; 26 L. J. (M.C.) 14.
(2) 7 E. & B. 609; 26 L. J. (M.C.) 121.
(3) 7 E. & B. 619; 26 L. J. (M.C.) 125.
(4) 80 L. T. (N.S.) 622.
(5) 21 J. P. 149.
(6) L. R. 6 C. P. 414.
(7) 6 Q. B. D. 100.

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that he had jurisdiction, and that the order nisi must be made absolute.

BUCKNILL J. concurred.

Order absolute.

Solicitors for appellants: *Crossman, Prichard, Crossman & Block, for Seppings & Wilkin, King's Lynn.*

Solicitors for respondents: *Burton, Yeates & Hart, for Coulton & Son, King's Lynn.*

P. B. H.

C. A.

1899 *Jan.* 23.

1900 *Feb.* 15.

[IN THE COURT OF APPEAL.]

DOBELL & CO. *v.* GREEN & CO.

Ship—Charterparty—"Cargo of Steam Coal as ordered by Charterers"—Colliery Guarantee—Strike Clause—Colliery on Strike.

It was agreed by a charterparty that the ship should sail to Cardiff, and proceed to such loading berth as the freighters might name, and should there load "a cargo of steam coal as ordered by the charterers," which they bound themselves to ship, except in the event of (inter alia) strike of shippers' pitmen; the vessel to be loaded as customary, "but subject in all respects to the colliery guarantee, in ——— colliery working days as may be arranged, any claim for demurrage in loading to be settled with colliery direct." The charterers, for the purpose of fulfilling their obligation under the charterparty, contracted with a colliery for a cargo of steam coal, subject to the usual exception as to strikes. Subsequently a strike of pitmen took place, which extended to 85 per cent. of the South Wales collieries, including the before-mentioned colliery. The charterers, in performance of their obligation under the charterparty, tendered to the shipowners the guarantee of that colliery, by which the colliery proprietors undertook to load the ship in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to the colliery guarantee, as not being in accordance with the charter, on the ground that the colliery was then on strike. The strike still continuing for three months after the arrival of the ship at Cardiff, her loading was in consequence delayed for that period. Steam coal might have been obtained from other collieries in the district which remained working during the strike, although at a very high price.

In an action by the shipowners against the charterers for damages for the detention of the ship:—

Held, by the Court of Appeal (affirming the judgment of Bigham J.),

that the shipowners were not entitled to object to the colliery guarantee as not being in accordance with the charterparty, and that the action was not maintainable.

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ACTION for breach of a charterparty by shipowners against charterers tried before Bigham J. without a jury.

The facts and the arguments sufficiently appear from the judgment.

Joseph Walton, Q.C., and *Horridge*, for the plaintiffs.

Carver, Q.C., and *Scrutton*, for the defendants.

Cur. adv. vult.

1899. Jan. 23. BIGHAM J. read the following judgment:— This was an action brought by shipowners against charterers for the alleged breach of a coal charter, the question being whether a colliery guarantee issued from a colliery where work had stopped by reason of a strike was such a guarantee as the shipowners were bound to accept.

The facts were as follows. On January 14, 1898, the defendants, Messrs. F. Green & Co., of London, chartered the plaintiffs' ship *Curzon* to carry a cargo of South Wales coal from Cardiff to Iquique. The vessel was at the time homeward bound to Liverpool, and was not expected to arrive at that port before April or May. The charterparty provides that after discharging her inward cargo at Liverpool the vessel shall sail to Cardiff and "shall proceed to such loading berth as the freighters may name, and shall there load a cargo of steam coal as ordered by charterers, which they bind themselves to ship (except in the event of (inter alia) strike of shippers' pitmen); the vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in ——— colliery working days as may be arranged; any claim for demurrage in loading to be settled with colliery direct."

Having made this charterparty, the defendants on February 3, 1898, bought two cargoes of Hood's Merthyr Colliery coal, one of which they intended for the *Curzon*, and the other for some other vessel, which they had also chartered, or were about to

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charter. (1) On April 6, 1898, the South Wales coal strike began, and work at Hood's Colliery stopped. While this condition of things existed—namely, on April 26—the defendants procured from Hood's Colliery the usual colliery guarantee, whereby the colliery proprietors undertook to load the *Curzon* in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. This guarantee was sent on in ordinary course by the defendants to the ship's agents. The ship's agents returned it in a letter, saying, "We decline to accept it, having regard to the fact that Messrs. Hood's Merthyr Colliery is on strike. As there are numerous other collieries which are not on strike, and from which coal can be obtained, the owners require to be loaded by a colliery which is now working." To this the defendants answered (as the facts were) that the coal had been bought from Hood's weeks before the strike began, and that the plaintiffs could have had the colliery guarantee at the time had they desired it; and they insisted that the ship should load from Hood's Colliery. From this position the defendants never receded. On May 14 the plaintiffs sent the *Curzon* from Liverpool to Cardiff, and she arrived at the latter port on May 16; she was ready to load by May 17, from which date, but for the strike, the twenty days mentioned in the colliery guarantee would begin to run. No doubt at this time, as appears from the correspondence, there was good reason to expect that the strike would speedily end; in fact, that it would end in time to enable the loading to be completed within the stipulated time. These hopes, however, proved to be vain, for the strike did not end till September 1, and the loading of the vessel did not finish till September 27. There is no complaint of delay in loading after the ending of the strike, but the plaintiffs insist that they were entitled to have a guarantee from a colliery which was at work on the date of the guarantee, and they claim damages based upon the loss of the use of their ship for three months or more, which they estimate at a sum equal to about half her selling value. The only other fact which it is necessary to

(1) The contract for the sale of the coal was subject to the usual exception as to strikes.

mention is, that during the whole of the strike a certain proportion, estimated at 15 per cent., of the South Wales collieries were at work, so that South Wales coal was obtainable, although at a very high price.

In these circumstances the question arises whether the defendants were bound to furnish any other or different guarantee from that which they sent on April 26. I am of opinion they were not. Business men in the relative position of the plaintiffs and defendants in this case know perfectly well what the course of business is. The merchant buys his coal from a particular colliery, and he makes a charterparty with a shipowner for a ship to carry the coal to its destination. Every one knows that the coal is to be shipped from the tip of the colliery into the vessel, and that the colliery will only undertake to do this subject to the strike clause. This may delay the ship, and the merchant takes care when making his charterparty to protect himself from liability for such delay, by stipulating with the shipowner that the latter shall be satisfied to load in accordance with the colliery's undertaking, or, in the words of the charterparty, "subject in all respects to the colliery guarantee." For taking this risk the shipowner gets a higher rate of freight than he could otherwise obtain. Now, in the present case, the charterparty provides that the cargo to be loaded by the ship is to be a cargo "as ordered by charterers." That gives the charterers the right to indicate the particular colliery from whose tip the shipowner is to take the coal. Then the charterers bind themselves to ship such cargo, "strikes excepted." By a further provision in the charterparty the vessel is "to be loaded as customary, but subject in all respects to the colliery guarantee, and any claim for demurrage in loading is to be settled with the colliery direct" —that is to say, if the colliery breaks faith, it is to them and not to the merchant that the shipowner is to look for redress.

Now, in face of these stipulations, it could not be, nor indeed is it, disputed that if this self-same guarantee had been given before the commencement of the strike (as it quite properly might have been given) it would have been a perfectly good guarantee, within the meaning of the charterparty, and all the

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consequences of the strike would have fallen on the shipowner. Why, then, does the fact that the strike begins before the guarantee is dated affect the rights of the parties? The plaintiffs say it was a document which they were entitled wholly to disregard, as being quite outside the meaning of the charter-party. Suppose the strike had ended before the vessel got to Cardiff (as it might well have done), would the guarantee have changed its character and become a valid document? That seems to me to be nonsense. It clearly was a "guarantee," and it was a colliery guarantee, unless, indeed, it can be said that Hood's Colliery had ceased to be a colliery because a strike had stopped its working. The plaintiffs in this case undertook to bear the consequences of strikes, and their contention is a specious, but in my opinion a quite fallacious, argument, by which they attempt to get rid of their responsibility, and to put it on the defendants. There must be judgment for the defendants with costs.

Judgment for defendants.

The plaintiffs appealed.

P. B. H.

1900. Feb. 14. *Joseph Walton, Q.C.*, and *Horridge*, for the plaintiffs. The words "as ordered by charterers" in the charter-party no doubt give a right to the charterers to select the colliery from which the coal is to be shipped, but it is submitted that the option so given must be subject to some reasonable limitation, and that they cannot under those words select a colliery at which, at the time when the selection is made, i.e. notified to the shipowners, there is a strike. It was laid down by Bowen L.J. in delivering judgment in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1) that, where the charterers have an option as to the dock or berth to which the ship is to be ordered, they must select one which is reasonably fit for the purpose; that it will not do for instance to select a dock the entrance to which is blocked. So the selection of a colliery which is ineffective, as for example a colliery which is not working because it is flooded, or, as in this case, because of a strike, is not the selection of a colliery reasonably fit for the

(1) [1891] 2 Q. B. 647.

purpose of loading the ship. The exception of strikes only covers a strike occurring after the charterers have made a reasonable selection of a colliery. They cannot be entitled by the terms of the charter to select a colliery which at the time of the selection is not a working colliery when steam coal can be procured from other collieries in the district. This was not an ordinary strike but a labour war on a large scale, and it was obvious that such a strike might go on for a long while. The selection of a colliery involved in such a strike was an unreasonable one.

[They also cited *Bulman & Dickson* v. *Fenwick & Co.* (1)]

Carver, Q.C., and *Scrutton*, for the defendants. The charterparty gave the defendants a right to select the colliery from which the coals were to be loaded. It is essential as a matter of business that the charterers should have this right, because they have to contract for the supply of the coal from a colliery before the ship arrives at the port of loading. The defendants were within the right given them by the charterparty in selecting the colliery with which they had contracted for the supply of the coal for shipment under the charterparty, notwithstanding that at that time a strike existed at that colliery. There is no term in the charterparty to the effect that they must not select a colliery where there is a strike at the time of selection. It is impossible to say whether such a strike will continue when the time for loading the ship arrives. In the present case the judge finds in his judgment that there was good reason to suppose that the strike would be at an end in time for the ship to be loaded from the colliery in accordance with the charterparty. It is contended that on the facts there was nothing unreasonable in the selection of Hood's Colliery by the charterers. The plaintiffs must go the length of contending that a colliery at which there is a strike ceases to be a colliery for the purposes of the charter.

Horridge, in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. I agree entirely with the judgment of my brother Bigham. This is an action upon a charterparty by

(1) [1894] 1 Q. B. 179.

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shipowners against charterers for damages for detention of the ship. By the charterparty, so far as material, the shipowners undertook to load a cargo of steam coal as ordered by the charterers, which they bound themselves to ship, except in the event, among other things, of a strike of shippers' pitmen. In other words, in case of the intervention of a strike, any loss thereby occasioned to the shipowners was to rest upon them. In February, 1898, the charterers contracted for the supply of a cargo of steam coal from Hood's Merthyr Colliery. In April a strike began which extended to 85 per cent. of the South Wales collieries, one of those affected being Hood's Merthyr Colliery. Subsequently in April, and before the ship arrived at Cardiff, the charterers gave notice to the shipowners that the coal with which they were going to load the ship under the charter was Hood's Merthyr coal. At that time the strike was still continuing, but the learned judge finds that there was then good reason to expect that the strike would speedily come to an end so as to enable the loading of the ship to be completed within the time specified. Why was not the order to load a cargo of Hood's Merthyr coal, notified in April to the shipowners, a perfectly good order by the charterers under the charterparty? It was argued that the charterers were not entitled to give the order, because there was at that time a strike at Hood's Merthyr Colliery in common with 85 per cent. of the South Wales collieries, and that they were bound to give an order for a cargo from one of the 15 per cent. of the collieries where there was no strike. But, where can be found in the charter any term to the effect that an order must be given to load the coal from a colliery which is not on strike? As I have already pointed out, the charterparty expressly provides that any loss arising from a strike is to fall upon the shipowners. I can find nothing in the charter which imports any such limitation of the charterers' right to select the colliery from which the coal is to be shipped as is contended for by the plaintiffs. It was said that this case was governed by a passage in the judgment of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1), in which he says that,

(1) [1891] 2 Q. B. 647.

where the charterer has an option as to the berth at which the ship is to discharge, he must choose a berth that is reasonably fit for the purpose, and that we ought to hold that the order that the ship should load coal from Hood's Merthyr Colliery was not a reasonable exercise of the charterers' option. I can see nothing in this case to lead me to the conclusion that the order given by the defendants was not a reasonable exercise of the option given to them by the charterparty.

COLLINS L.J. I am of the same opinion. I think the judgment of Bigham J. was perfectly right. It seems to me that by the terms of the charterparty, as between these two business firms, the risk of any difficulty arising from a strike was deliberately put upon the shipowners, and, that being so, that the very case contemplated by the exception as to strikes has arisen. By the terms of the charter the shipowners come under the obligation to load on their ship a cargo of steam coal from a colliery which the charterers have a right to select, and the charterers take upon themselves the obligation of shipping such a cargo except in the event of (among other things) a strike. What right have the shipowners to complain on its being notified to them under the charter that the ship must go to a particular colliery at which there is at the time of that notification a strike? It appears to me that at that point of time the existence of the strike is nihil ad rem. The shipowners must send their ship to the place at which they have undertaken to load, and the charterers have undertaken to ship a cargo; and it is not until the ship has arrived there, and the question as to the obligation of the charterers to ship the cargo arises, that the existence of a strike becomes material. The charterers are entitled to say to the shipowners, "You must do what you have contracted to do: you must put your ship in position at the place which we have indicated; then, and not till then, the question whether we are relieved from the obligation which we have undertaken by reason of the existence of a strike will arise." I think it would be unreasonable, having regard to the uncertainty of the duration of strikes, to impose upon the charterers an obligation to name a colliery where

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Collins L.J.

there was no strike in existence at the moment. Although there might be a strike in existence at the colliery named, that strike might be at an end at the time when the obligation of the charterers to load attached. I do not think that upon the true construction of the charter there is any such fetter imposed upon the option given to the charterers as is suggested by the plaintiffs.

ROMER L.J. I am of the same opinion. I agree that the charterers were for the purposes of this charter bound to select what, for the sake of brevity, I will call a "reasonable colliery"; and I will assume, though I do not decide it, that the time for ascertaining whether the colliery selected is such a colliery is the time at which the selection is notified to the shipowners. But, assuming that, I come to the conclusion, having regard to the terms of this charterparty and especially those with relation to strikes, that the colliery in question was not an unreasonable one to select at the time when its selection was notified to the shipowners, merely because at that time there was a strike in existence, which, so far as any one could judge, might have ended at any moment. The selection of that colliery not being an unreasonable one, the shipowners were bound by the terms of the charterparty to accept the guarantee of that colliery.

Appeal dismissed.

Solicitors for plaintiffs: *Walker, Son & Field, for Weightman, Pedder & Weightman, Liverpool.*

Solicitors for defendants: *Parker, Garrett & Holman.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
Feb. 27.

GREENWELL *v.* HOWELL AND ANOTHER.

Local Government—Public Authorities, Protection of—Act done in Execution of Act of Parliament—Public Highway—Action of Trespass—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

A landowner denying that a road over his land was a public highway, and threatening proceedings against any person using it, two officials of the county council were directed by the council, acting under the provisions of the Local Government Act, 1894, s. 26, to use the road for the purpose of formally testing the right, which they accordingly did. The landowner thereupon brought an action of trespass against them, but at the trial it was found that the road was a public highway, and judgment was given for the defendants :—

Held, that, the acts in respect of which the action was brought having been done by the defendants in pursuance or execution or intended execution of the Local Government Act, 1894, s. 26, the case came within the Public Authorities Protection Act, 1893, s. 1, and therefore the defendants were entitled to costs to be taxed as between solicitor and client under that section.

APPEAL from the order of Bruce J. that the defendants' costs in the action should be taxed as between solicitor and client.

The action was one of trespass brought by the owner of land in Surrey against the surveyor and deputy clerk of the Surrey County Council under the following circumstances. There had been for some time a question whether two roads over the plaintiff's land were public highways or not. The plaintiff having obstructed the roads, a representation was made on the subject to the district council under the Local Government Act, 1894, s. 26, sub-s. 4, and, the district council not taking proceedings in the matter, the Surrey County Council passed a resolution under the sub-section transferring the powers and duties of the district council under the section to themselves. The plaintiff then removed the obstructions, but his solicitor wrote to the clerk to the county council stating that, though he had done so, he did not admit that the roads were public

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highways, and that he would prosecute any person trespassing upon them. His solicitor further stated in the same letter that, in order that the question of right might be tried, his client was prepared to bring an action of trespass in the Queen's Bench Division against any person so trespassing, and suggested that the question of right might be conveniently raised by the county council authorizing their surveyor or some other person on their behalf to commit a nominal trespass as was usually done in similar cases. It was thereupon arranged that on a certain day the defendants should by direction of the council drive along the roads in question, which they accordingly did. The plaintiff then brought the action against them. It was tried before Bruce J. without a jury. The learned judge found that the roads were highways and accordingly gave judgment for the defendants with costs, and ordered that the costs should be taxed as before mentioned. (1)

Neville, Q.C., and *MacSwinney*, for the plaintiff. This action is not such an action as comes within the provisions of the Public Authorities Protection Act, 1893, s. 1. The action is not against the county council itself, nor are the acts for which the defendants were sued acts which purported to be done in pursuance of the council's statutory powers. They were done in pursuance of the public right of way, and the only question in the action was whether the ways were highways or not. The defendants had to justify their acts, not by any authority given them by the council, but by virtue of their right as members of the public. The fact that the plaintiff had himself suggested that the council should send their servants to use the ways, in order that the question might be tested, cannot make the section applicable, if otherwise it would not apply. If the section were applicable, the result would be that, although the plaintiff in such a case did not know and had no means of knowing that the acts of the defendants were done by anybody's authority, or that the county council

(1) It was agreed that the learned judge should make an express order as above in order that the question might be conveniently raised for the Court of Appeal prior to taxation.

had anything to do with the case, it might be set up for the first time on the taxation of costs that the defendants were acting by the direction of the county council, and therefore were entitled to costs as between solicitor and client. It may be that, if the action had been brought against the council, they would come within the protection given by the Public Authorities Protection Act, 1893, s. 1, by virtue of the public duty of protecting the rights of the public over highways cast upon them under the Local Government Act, 1894, s. 26. But in this case nobody who had a public duty to protect the rights of the public over the highways was a party to the action. If the defendants acted in pursuance of any duty at all in going along those highways, it was in pursuance of their private duty to their employers, the council, not of any public duty.

Jelf, Q.C., and *G. Humphreys*, for the defendants. The protection given by the Public Authorities Protection Act, 1893, s. 1, is not confined to public authorities, but extends to every person who acts in pursuance, or execution, or intended execution of any Act, or of any public duty or authority. It is not denied that the county council in taking steps to protect the rights of the public over highways, and to prevent the obstruction of highways under the Local Government Act, 1894, s. 26, would be within the provisions of the Public Authorities Protection Act, 1893; and, if so, it is clear that their officials or servants doing under their authority the necessary acts for that purpose are equally within its provisions. A corporate body can only act through its servants or agents; and the applicability of the protection given by the Act cannot depend on whether the plaintiff chooses to sue the council or only their servants in respect of the acts done by the direction of the council. If there were a physical obstruction placed across a highway, and the council directed their servants to remove it, clearly the servants would be acting in the execution of the Local Government Act, 1894, s. 26, and therefore would be within the protection given by the Public Authorities Protection Act, 1893. It cannot make any difference that the obstruction is not physical, but by threat of legal proceedings;

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and the acts done by the council's servants by direction of the council in order to test the question by user of the way are as much acts done in pursuance or execution of the Local Government Act, 1894, s. 26, as the removal of a physical obstruction would be.

Neville, Q.C., in reply.

A. L. SMITH L.J. This is an appeal against the order of Bruce J., who held that the defendants were persons who came within the provisions of the Public Authorities Protection Act, 1893, s. 1 (*b*). In this case there had been a dispute for a long time as to whether certain ways were public highways, and the plaintiff had threatened to prosecute any person using them without his leave. Ultimately it was agreed between the county council and the plaintiff that the best way to settle the question would be for the county council to send two of their officials to use the ways in order that the right might be tested by means of an action of trespass brought by the plaintiff in respect of such user. Accordingly, by the direction of the county council and with the full knowledge of the plaintiff, if that be material, the two defendants, the county surveyor and the deputy clerk of the council, for the purpose of raising the question of right, drove along the road on a particular day, and an action of trespass was then brought against them by the plaintiff in pursuance of the before-mentioned arrangement. The action was tried before Bruce J., who found that the ways in question were highways, and accordingly gave judgment for the defendants. The defendants thereupon claim to be entitled to costs as between solicitor and client under the Public Authorities Protection Act, 1893, s. 1 (*b*), and the question is whether they come within the provisions of that enactment. The section enacts in the widest possible terms that, "where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following

provisions shall have effect: . . . . (*b*) wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." The question, therefore, is whether the acts which the defendants did, and in respect of which the action was brought, were acts done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority. It is clear that, in doing what they did, the defendants were acting in pursuance of the express orders of the county council, who had directed them to use these ways in order to raise the question whether they were highways. By the Local Government Act, 1894, s. 26, so far as material, it is provided that it shall be the duty of the district council to protect all public rights of way, and to prevent, as far as possible, the stopping or obstruction of any such right of way, whether within their district, or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district; that the district council may, for the purpose of carrying the section into effect, institute or defend any legal proceedings, and generally take such steps as they deem expedient; and that, if the district council fails to take proceedings as mentioned in the section, the county council may resolve that the powers and duties of the district council under the section shall be transferred to the county council. The plain meaning of that section is that, where any person interferes with the user of a highway by the public, whether by setting up a physical obstruction or by threat of legal proceedings, it shall be the duty of the district council, or, if the county council have taken over their duty, of the county council, to prevent such an obstruction of the highway by taking proceedings to preserve the rights of the public, or, if the person seeking to stop the highway chooses to take legal proceedings, by defending them, or by taking such other steps as they may deem expedient for the purpose. I think that, having regard to these provisions, the acts done by the defendants in pursuance of the orders given by the county council were clearly acts done in pursuance or execution or intended

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execution of an Act of Parliament. For these reasons I think that the order of Bruce J. was right, and this appeal must be dismissed.

COLLINS L.J. I am of the same opinion. The terms of the Public Authorities Protection Act, 1893, s. 1, clearly extend the protection given by the Act, not only to the public body acting as principals in the execution of an Act of Parliament or public duty or authority, but also to the individual subordinates carrying out their mandates. That being so, the only remaining question is whether the acts done by the defendants for the purpose of protecting these public rights of way under the Local Government Act, 1894, s. 26, were acts coming within s. 1 of the Public Authorities Protection Act, 1893. In my opinion they clearly were acts coming within the express terms of that section.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Norton, Rose, Norton & Co.*
Solicitors for defendants: *Wyatt & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
Feb. 28.

In re A. B. & CO.

Bankruptcy—Court of Bankruptcy—Jurisdiction—Foreigner resident Abroad but Trading in England—Act of Bankruptcy—Assignment for Benefit of Creditors generally executed Abroad—Notice of Suspension of Payment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*), (*h*); *s.* 6, *sub-s.* 1 (*d*).

The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident out of the jurisdiction who, without himself coming within the jurisdiction, has carried on business, contracted debts, and has assets there, and has executed out of the jurisdiction an assignment of his property for the benefit of his creditors generally, or has given notice of suspension of payment to creditors within the jurisdiction. Such a person is not a "debtor" within the meaning of the Bankruptcy Act, 1883.

In re Pearson, [1892] 2 Q. B. 263, followed.

APPEAL against the dismissal of a bankruptcy petition against A. B. & Co.

The firm of A. B. & Co. was constituted of two partners, who were citizens of the United States of America, and resided in Baltimore, where their principal business was carried on. They had also a branch business in the City of London, which was carried on by a manager in their name and on their behalf. In the carrying on of that branch business they had contracted debts in England, and they had assets in England.

On January 16, 1900, two of the English creditors of the firm filed a bankruptcy petition against the firm in the High Court, alleging that, within three months before the date of the presentation of the petition, the firm had committed two acts of bankruptcy, namely—(1.) that on January 6, 1900, they gave notice to one of the petitioning creditors that they had suspended or were about to suspend payment of their debts; (2.) that on December 16, 1899, the debtors made a conveyance and assignment of all their property to a trustee for the benefit of their creditors generally.

The notice of suspension was sent to the English creditors.

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A. B. & Co., *In re.*

The creditors' deed was executed by the debtors in America, and the trustee under it was the manager of their business in America.

The debtors opposed the making of a receiving order, and disputed the allegations of the petition, and in particular they disputed the jurisdiction of the Court.

The registrar refused to make a receiving order and dismissed the petition, on the ground that the debtors being foreigners and out of the jurisdiction the Court had no jurisdiction over them. In his opinion the case was governed by *Ex parte Blain* (1), *Ex parte Crispin* (2), and *In re Pearson.* (3)

The petitioning creditors appealed.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the petitioning creditors. The respondents are subject to the jurisdiction, because they have carried on business in England: Bankruptcy Act, 1883, s. 6, sub-s. 1 (*d*). The act of bankruptcy constituted by the execution of the creditors' deed is one which may, under s. 4, sub-s. 1 (*a*) (4), of the Act, be committed "in England or elsewhere." This distinguishes the present case from the cases on which the registrar relied. In *In re Pearson* (3) the question was whether a bankruptcy notice could be served upon a foreigner out of the jurisdiction of the Court, and it was held that it could not. The object of the service of a bankruptcy notice is to bring about an involuntary act of bankruptcy—to compel the debtor to commit an act of bankruptcy if he does not pay the judgment debt; and sub-s. 1 (*g*) of s. 4 does not say that that act of bankruptcy can be committed "elsewhere" than in

(1) (1879) 12 Ch. D. 522.

(2) (1873) L. R. 8 Ch. 374.

(3) [1892] 2 Q. B. 263.

(4) By s. 4, sub-s. 1, "A debtor commits an act of bankruptcy in each of the following cases (inter alia): (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." "(*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

By s. 6, sub-s. 1, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

England. The execution of a deed is a voluntary act on the part of the debtor. The effect of the registrar's decision is to strike the words "or elsewhere" out of sub-s. 1 (*a*) of s. 4.

The respondents are "debtors" in England; they have had within a year a place of business in England, and they have committed the act of bankruptcy specified in sub-s. 1 (*a*) of s. 4. All the requirements of the Act are satisfied, and a receiving order should be made. If this is not done, the English creditors will have no remedy; the English assets will be realized by the trustee of the deed, and the proceeds will be sent to America and employed in paying the American creditors of the firm, to the exclusion of the English creditors. A foreigner may not become subject to the English bankruptcy law merely by contracting a debt in England; but, if he carries on business here, and then deals with his English assets in such a way as to defeat his English creditors, he commits an act of bankruptcy and becomes liable to the English bankruptcy law. This deed was intended to operate under English law, and to make the English assets available for the payment of the creditors in America. The respondents could have been sued in the High Court by an English creditor, and if he had recovered judgment he could have levied execution on their English property. No doubt, as regards acts of bankruptcy which must be committed in England, the debtor must be within the realm. But this particular act of bankruptcy can be committed elsewhere. At any rate, the respondents, though not personally present, were commercially present in England. In *In re Hecquard* (1) it was held that a receiving order could be made against a domiciled Frenchman who had occupied for three months furnished lodgings in England.

[LINDLEY M.R. The point was not taken that he was not a "debtor" within the Act, and, indeed, it did not arise. He had contracted the debt to the petitioning creditor when he was in England.]

In *In re Clark* (2) it was held that a bankruptcy notice issued against a foreigner who was abroad, and who had not ordinarily resided or had a dwelling-house or place of business

(1) (1889) 24 Q. B. D. 71. (2) [1896] 2 Q. B. 476.

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in England within the preceding year, was valid. There the Court assumed an extra-territorial jurisdiction, as it did also in *In re Clark*. (1) In that case the Court, instead of committing a judgment debtor, who was a foreigner, upon a judgment summons, under s. 5 of the Debtors Act, 1869, made a receiving order against him under sub-s. 5 of s. 103 of the Bankruptcy Act, 1883, though he had not within a year ordinarily resided, or had a dwelling-house or place of business in England, and was not, therefore, liable to bankruptcy proceedings under s. 6 of the Bankruptcy Act, 1883.

[LINDLEY M.R. The Court having once acquired jurisdiction by means of the judgment summons, there was no difficulty in applying s. 103.]

In s. 4 "a debtor" cannot mean a debtor who has committed an act of bankruptcy in England, for the section goes on to define "acts of bankruptcy."

The other act of bankruptcy, the notice of suspension of payment, was committed in England. It does not signify where the notice was posted; it was received in England, and it was meant to operate there.

C. A. Russell, Q.C., and *Carrington*, for the debtors, were not called upon.

LINDLEY M.R. I will not say what view I might have been inclined to take if it were not for the previous decisions of this Court which are binding upon us. But, having regard to those decisions, I think this appeal must fail. It must be borne in mind that bankruptcy is a very serious matter. It alters the status of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners, who are not subject to our jurisdiction. What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then, of course, the Court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that, unless Parliament has conferred upon the Court that power in language which is unmistakable, the

(1) [1898] 1 Q. B. 20.

Court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments. Unless Parliament has used such plain terms as shew that they really intended us to do that, we ought not to do it. That is the principle which underlies the decisions in *Ex parte Blain* (1) and *In re Pearson.* (2) Nothing can be more plain than the language of James L.J. in *Ex parte Blain* (1), and the language used by Cotton L.J. is to the same effect. *Ex parte Blain* (1) was a case under the Bankruptcy Act, 1869. And when in *In re Pearson* (2) the effect of the Bankruptcy Act, 1883, was considered, the Court, consisting of Lord Esher M.R., and Fry and Lopes L.JJ., said that the language of s. 6 was not plain enough to override that general principle. I can see the difficulty in construing s. 6. It might possibly be thought that the word "debtor" is so plain as to confer jurisdiction over foreigners. But the Court of Appeal has said that it is not, and I am unable to distinguish the present case from *In re Pearson.* (2) The point about the other act of bankruptcy really involves the same question. The appeal must be dismissed with costs.

Rigby L.J. I agree.

Vaughan Williams L.J. I also agree.

Appeal dismissed.

[Leave was given to appeal to the House of Lords.]

Solicitors: *Bentwich, Watkin-Williams & Gray; J. H. Moggridge.*

(1) 12 Ch. D. 522.

(2) [1892] 2 Q. B. 263.

W. L. C.

Distinguished. KITCHEN'S TRUSTEE *v.* MADDERS. [1949] 1 Ch. 588

C. A.

1899

March 28;
Aug. 10;
Nov. 10.

[IN THE COURT OF APPEAL.]

In re DAINTREY.
Ex parte MANT.

Bankruptcy—Debtor and Creditor—Mutual Debts or Dealings—Set-off—Act of Bankruptcy—Receiving Order—Account of Mutual Dealings—Date for Taking Account—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

D., a solicitor, being at the time indebted to M., another solicitor, in a sum of 86*l.*, on December 24, 1892, committed an act of bankruptcy of which M. had no notice. On December 31, 1892, D. sold his business to M. under an agreement which fixed as the price a portion of the profits expected to be earned for three years from the business sold. Thereupon M. took possession of and carried on the business. On January 17, 1893, a receiving order was made against D., but no profits had then been earned from the business. At the end of the three years a sum of 300*l.* was found to be due from M. to D. under the agreement as the price of the business, and this sum M. paid to D.'s trustee in bankruptcy after deducting the 86*l.* due from D. to M. The trustee however objected that M. could not set off the 86*l.* against the 300*l.*; that he must pay the 300*l.* in full and be satisfied with a dividend on the debt of 86*l.*

The county court judge allowed the objection, and an appeal by M. to the Divisional Court (Wright and Bigham JJ.) was dismissed, the Court differing in opinion. On appeal by M., by leave, to the Court of Appeal:—

Held, that the dealings between M. and D. were "mutual dealings" within s. 38 of the Bankruptcy Act, 1883, and that M. was therefore entitled to set off the 86*l.* due to him from D. against the 300*l.* due from him to D.; also that the date of the receiving order, and not that of the act of bankruptcy, was the proper date at which to ascertain what those dealings were, so as to be capable of being made the subject of set-off under the section.

APPEAL to the Divisional Court from the county court of Sussex.

The facts and arguments are fully set out in the judgments in the Divisional Court.

Dickens, Q.C., and *Hohler*, for the appellant.

Herbert Reed, Q.C., and *Mackintosh*, for the respondent.

Cur. adv. vult.

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1899. Aug. 10. WRIGHT J. read the following judgment:— On January 17, 1893, a receiving order was made against Daintrey, who was a solicitor, the act of bankruptcy being a circular to creditors dated December 24, 1892. Adjudication did not take place until August, 1893. At the date of the receiving order Daintrey owed the appellant Mant (who carried on business as a solicitor under the name of Mant & Mant) 86*l.* for money paid by Mant at Daintrey's request before the act of bankruptcy. Mant, on the other hand, was at the same date under a possible liability to Daintrey by virtue of an agreement made on December 31, 1892, for the purchase of Daintrey's business by Mant, under which agreement Mant was to pay to Daintrey a portion of the profits expected to be earned in the business after the transfer of it to Mant. At the date of the agreement Mant had no notice or knowledge of any act of bankruptcy committed by Daintrey. No profits had been made in the business by Mant before the date of the receiving order, but since that date profits have been made both before and since adjudication, and the proportion of them payable to Daintrey is about 300*l.* Mant has never proved for his own claim of 86*l.*, but, the trustee having applied to the Court for an order against Mant for payment of the 300*l.* as part of the bankrupt's estate, Mant claims to set off the 86*l.* pro tanto against the 300*l.*; and the question is whether there ought to be such a set-off of a debt due from the bankrupt before his bankruptcy against a debt to the bankrupt's estate which did not come into existence as a debt, demand, or liability until after the date of the receiving order, but was until after that date a mere possibility of indebtedness. In considering this question there are three things which it is specially important to observe. The first is that there is nothing to shew any connection between the cross-demands. They are in respect of entirely separate and independent transactions. The second is that Mant was not under any obligation to carry on the business which he had bought. He might not choose to do any business, or none might be offered to him, or there might not be any profit. The third is that the question arises, not in an action, but in a proceeding in the bankruptcy. The question

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of course, does not depend on the general law of set-off, which until 1879 depended on the statutes 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4, and since the repeal of those Acts by the 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49, depends upon the saving clauses of the repealing Acts. There cannot in the present case be a set-off by virtue merely of that law for two reasons. One is that it applies only to set-off in an action. The other is that the general law of set-off has always been held to be applicable only where the cross-demands are in the same right, or in cases within the special exception as to executors which was contained in the repealed Acts. In the present case, in the events which happened, the contract of December 31, 1892, became, by force of the Bankruptcy Act, transferred to and vested in the trustee retrospectively as from the date of the act of bankruptcy. At that date there was no existing liability on the part of Mant to pay anything, or to do or restore anything. There never was any right of action in the bankrupt on the contract, or against the trustee for the debt. The cross-demands, therefore, are not mutual—are not in the same right: see, e.g., per Lord Eldon in *Ex parte Blagden* (1); *Shipman* v. *Thompson* (2); *Wood* v. *Smith* (3); *Groom* v. *Mealey* (4); *Beckwith* v. *Bullen.* (5) There are cases, such as *Hulme* v. *Muggleston* (6), *Bittleston* v. *Timmis* (7), in which this difficulty has been overcome by the adoption in actions of the doctrines of bankruptcy law, but such cases depend on that law and not on the statutes of set-off. The present case, therefore, must be determined solely upon the proper construction of the Bankruptcy Act, 1883.

The 38th section of that Act provides as follow: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account

(1) (1815) 19 Ves. 465; 2 Rose's Bank. Cases, 249.
(2) (1738) Willes, 103.
(3) (1838) 4 M. & W. 522.
(4) (1835) 2 Bing. N. C. 138; better reported in 2 Scott, 171; see in 4 M. & W. 526, n.
(5) (1858) 8 E. & B. 683.
(6) (1837) 3 M. & W. 30.
(7) (1845) 1 C. B. 389.

shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."

On this section it must first be observed that although by its terms the enactment seems to be confined to set-off as between the bankrupt and a person proving or claiming to prove in the bankruptcy, yet it is settled that the same right of set-off may be claimed in an action brought or in other proceedings taken in the bankruptcy by a trustee or liquidator: *Peat* v. *Jones* (1); *Mersey Steel and Iron Co.* v. *Naylor.* (2) There is no difference for this purpose between the language of the Act of 1869 and that of the Act of 1883. It is, therefore, no ground of objection to Mant's claim of set-off that he is asserting it, not by way of proof, but in answer to the trustee's application for an order for payment of the 300*l.*

Then the first question to be determined is, What is the date with reference to which the account is to be taken under the section and the set-off made? Until this question is answered it is impossible to say what claims on either side are to be taken into the account. Is the date to be the date of the commencement of the bankruptcy, as defined by s. 43, or the date of the receiving order, or the date of adjudication, or the date when the particular creditor comes in to prove, or the date when an action is brought or other proceeding taken by the trustee against him? It is obvious that the question whether and how far the set-off is to be allowed may have to be answered differently according as one or other of these dates is to be adopted. In the present case, if the date is the date of adjudication, Mant can utilize his own claim to defeat a part of

(1) (1881) 8 Q. B. D. 147.

(2) (1882) 9 Q. B. D. 648; (1884) 9 App. Cas. 434.

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the claim against him under the agreement; but it may be otherwise if the date is the date of the receiving order.

Under the earlier statutes, such as 4 & 5 Anne, c. 16, and 5 Geo. 2, c. 30, s. 28, it was settled in 1744—*Ex Parte Groome* (1) —by Lord Hardwicke that the line was to be drawn at the date of the commission, which was then the commencement of the bankruptcy, although the assignees' title might, and usually, of course, did, relate back to an earlier time; and *Dickson* v. *Evans* (2), per Lord Kenyon C.J. (3), was to the same effect. The Bankruptcy Act of 1825 (6 Geo. 4, c. 16, s. 50) confined the set-off of mutual credits to such as had arisen before the commission: *Collins* v. *Jones* (4); and that enactment continued in force until 1849.

The Act of 1849 abolished fiats and substituted petitions followed by adjudications. There was no enactment like that in s. 11 of the Act of 1869, or in s. 43 of the Act of 1883, making the bankruptcy relate back to and commence at the act of bankruptcy on which the petition was founded, or any prior act of bankruptcy, the common law doctrines of relation of title being apparently thought sufficient. The set-off section (s. 171) contained no indication of the date with reference to which the account was to be taken.

Upon that Act the cases of *Naoroji* v. *Chartered Bank of India* ((1868) L. R. 3 C. P. 444, where the head-note is wrong as to the facts; the best report is in 18 L. T. (N.S.) 358) and *Astley* v. *Gurney* (5) were decided. In the former case Bovill C.J. said: "The turning-point is what was the state of things at the time of the bankruptcy, or that which is for this purpose equivalent thereto, at the execution of the deed." Byles J. and Montague Smith J. agreed, and from their judgments it is plain that they meant that in case of bankruptcy the line was to be drawn at the date of adjudication. In the latter case, in the Exchequer Chamber, the "time of the bankruptcy" is said to be the material date, and evidently that is intended to mean the date of adjudication. So in *In re Douglas, Ex parte Ryder* (6)

(1) (1744) 1 Atk. 115.
(2) (1794) 6 T. R. 57; 3 R. R. 119.
(3) 6 T. R. at p. 58.
(4) (1830) 10 B. & C. 777; 34 R. R. 572.
(5) (1869) L. R. 4 C. P. 714.
(6) (1871) L. R. 6 Ch. 413.

James and Mellish L.JJ. decided that under a deed under the Act of 1861, which provided for distribution as if there had been an adjudication at the date of the deed, the line must be drawn at that date.

The Act of 1869, like the Act of 1849, did not explicitly define the date with reference to which the account was to be taken. By s. 11 it enacted in general terms that the bankruptcy should be deemed to have relation back to, and to commence at, the completion of the act of bankruptcy on which the adjudication was made, or the first act of bankruptcy committed within twelve months before adjudication. By s. 15 it vested in the trustee all the property which belonged to the bankrupt at the commencement of the bankruptcy; but by s. 31 the debts, &c., provable in the bankruptcy were debts, &c., to which the bankrupt was subject at the date of the order of adjudication, or might during the bankruptcy become subject by reason of any obligation incurred before that date. By s. 38 it provided for set-off as follows: [The learned judge read the section (1), and continued:—]

In 1874 this section was considered by Lord Selborne L.C. and James and Mellish L.JJ. in *In re Deveze, Ex parte Barnett* (2), where the bankrupt owed a creditor 3010*l.* and the creditor owed the bankrupt 88*l.*, secured by a lien on goods of the creditor, and the question was whether the trustee was entitled to get paid the 88*l.* in full by enforcing his lien, and it was held that the debts were pro tanto reciprocally cancelled by the bankruptcy, and the lien ceased with the cancellation of

(1) Sect. 38 of the Bankruptcy Act, 1883, is as follows: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him."

(2) (1874) L. R. 9 Ch. 293.

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the debt for which it was a security. There the creditor had come in to prove for his 3010*l.*, and Lord Selborne L.C. seems to have considered that the set-off took effect at the time of his so coming in (1): "when there have been mutual credits, ... and a proof is to be made in bankruptcy, there is to be a rule of set-off, not as I understand it, at the option of either party, but an absolute statutory rule—'The balance of such account, and no more, shall be claimed or paid on either side respectively.' . . . . Barnett & Co. come in to prove, and the statute expressly says that the amount of their proof shall be ascertained by writing off the small debt from the larger." Mellish L.J. said (2): "The simple question is whether, upon the construction of this clause, the set-off is not made equivalent to payment. I doubt whether it does not affect it even before either party has come in to prove; but at any rate when the party does come in to prove, the statute sets the one debt against the other, and that is equivalent to payment. It, in fact, is equivalent to saying, where there are mutual debts, that a party, by coming in and claiming to prove, necessarily causes a payment or satisfaction of his debt so far as the set-off extends."

In 1881 the question was expressly raised in the Privy Council in *Elliott* v. *Turquand* (3) whether the account for the purposes of set-off under s. 39 of the Act of 1869 must not stop and be taken as at the date of the act of bankruptcy. It was held that in a case of continuous mutual dealings and accounts the line is not ipso facto drawn as at the act of bankruptcy, but the accounts must be continued at least until the party claiming the benefit of s. 39 has notice of an act of bankruptcy. In 1884, in *Mersey Steel and Iron Co.* v. *Naylor* (4), a question was whether the Judicature Act, 1875, had imported into liquidations the bankruptcy rule of set-off. In holding that it had that effect, Lord Selborne L.C. said of s. 39 (5): "Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive absolute rule for the

(1) L. R. 9 Ch. at p. 295.
(2) L. R. 9 Ch. at p. 297.
(3) (1881) 7 App. Cas. 79.
(4) 9 Q. B. D. 648; 9 App. Cas. 434.
(5) 9 App. Cas. at p. 438.

purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy." The terms of this observation seem expressly to limit the set-off to cases of proof; but this cannot be the real meaning, because the decision of the House was in affirmance of the judgment of the Court of Appeal allowing a set-off, not upon a proof in the liquidation, but in an action by the liquidator. In the same year, in *In re Milan Tramways Co., Ex parte Theys* (1), in the Court of Appeal, Lord Selborne said (2)—and this was the ground of decision of the case: "Under s. 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate or paid to the estate, as the case may be." Fry L.J. said of s. 39 (3): "That section refers to the state of things at the time of the bankruptcy. . . . That has been the uniform rule." These cases seem to be decisive that under the Act of 1869 the account was to be taken with reference to the time of the bankruptcy; but they do not explicitly determine whether that expression meant the date of adjudication, or the date of the act of bankruptcy to which the bankruptcy related, and at which it commenced by virtue of s. 11 of that Act; and *Elliott* v. *Turquand* (4) remains the only express authority on that point.

The Act of 1883 differs from the Act of 1869 in the fundamental particular of the introduction of receiving orders preliminary to adjudication. It differs also in this—that whereas in the Act of 1869 the provision that a bankruptcy shall be deemed to have relation back to and to commence at the date of the act of bankruptcy (or some earlier act of bankruptcy) was contained in a section (s. 11) which was placed among the

(1) (1884) 25 Ch. D. 587.
(2) 25 Ch. D. at p. 591.
(3) 25 Ch. D. at p. 594.
(4) 7 App. Cas. 79.

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general provisions at the beginning of the Act so as apparently to govern the whole Act, the corresponding provision (s. 43) of the Act of 1883 is placed in a fasciculus of clauses under the heading of "Property available for payment of debts." Further, the language of s. 38 of this Act differs from the language of s. 39 of the Act of 1869. It is necessary briefly to consider the general framework of the Act in order to determine what is the effect of these alterations. By s. 5, on proof of an available act of bankruptcy, the Court may upon petition make a receiving order "for the protection of the estate." By s. 9, on the making of a receiving order an official receiver "shall be thereby constituted receiver of the property of the debtor, and thereafter . . . . no creditor to whom the debtor is indebted in respect of any debt provable, &c., shall have any remedy" without leave; but this section has not the effect of divesting the property of the debtor. If no arrangement is approved by the creditors, adjudication follows, and thereupon (s. 20) the property of the debtor vests in the trustee (or official receiver) for division among the creditors. By s. 37, the debts provable in the bankruptcy are the debts "to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order." Then follows s. 38 (above set out), providing for set-off in case of "mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order." (In s. 39 of the Act of 1869 the words were—"between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy.") Except as above mentioned, this section is in all material respects verbatim the same as s. 38 of 1869. By s. 43 (under the heading before mentioned), "the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him," or the earliest act of bankruptcy within the preceding three months. Under the Act of 1869 it was twelve months. By s. 44, the

property divisible amongst the creditors is the debtor's property at the commencement of the bankruptcy or acquired before his discharge. By s. 45, executions pending at the time of bankruptcy are not protected unless completed before the receiving order and before notice of act of bankruptcy or of petition. By s. 49, bonâ fide transactions before receiving order are protected—not, as in the Act of 1869, before adjudication. By s. 168, "property" includes contingent interests arising out of or incident to property.

If these provisions are considered without reference to authority, it seems to me that they ought to be understood as fixing the date with reference to which the account is to be taken for the purposes of set-off at the date of the receiving order, which for nearly all the purposes of the Act, except the commencement of the title of the trustee, is made the material date. Primâ facie it would seem that the line which is drawn for defining what debts are to be provable in the bankruptcy must be also the line for defining what cross-claims are to be set off in the case of a creditor whose set-off is not stopped at an earlier date by notice of an act of bankruptcy. If the line were to be drawn at different times for the two purposes of proof and set-off, the result might be unjust. If it were drawn for the purposes of set-off at the "commencement of the bankruptcy," as defined by s. 43, there would be three months (under the Act of 1869, s. 11, it would have been twelve months) during which one side of a cross-account would be growing for purposes of proof, and yet the other side would be cut short for purposes of set-off. If it were not drawn until adjudication, the injustice would be the other way, but it might be equally great.

I cannot find any case on the construction of the Act of 1883 which is opposed to this view, nor any in which it is expressly adopted. In 1885, in *In re Gillespie, Ex parte Reid* (1), the only point decided by Cave J. was that a creditor of the bankrupt, if he accepts after notice of the bankruptcy a bill belonging to the bankrupt's estate, cannot claim to set off his own demand against his new liability on the bill; and although the

(1) (1885) 14 Q. B. D. 963.

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decisions upon the Act of 1869 are cited and relied on, it does not seem that the question whether the line should be drawn at the date of the commencement of the bankruptcy, as defined by s. 43, or at the date of the receiving order or at the date of adjudication, was considered at all. It, however, rather appears that the receiving order was regarded as "the bankruptcy." In *Palmer* v. *Day & Sons* (1) it was assumed, apparently without discussion, that the date of the receiving order was for the purposes of that case the material date. In *Elgood* v. *Harris* (2) the "date of the bankruptcy" is treated as the critical date, but there is nothing to indicate what this means. There seems to be no other reported case upon the Act of 1883 in which any reference is made to the question as arising in bankruptcy. In liquidation the date is in several cases (e.g., *Eberle's Hotels Co.* v. *Jonas* (3), per Fry L.J.) assumed to be the date of winding-up; and no doubt, as Charles J. thought in *Sovereign Life Assurance Co.* v. *Dodd* (4), the date of the petition for winding-up is, by virtue of s. 84 of the Companies Act, 1862, the critical date in liquidation.

On the whole it appears to me that, whereas under the earlier Bankruptcy Acts the date with reference to which the account was to be taken for purposes of set-off was the date of the commission, and under the Act of 1869 it was the date of adjudication, under the Act of 1883 it is the date of the receiving order, which is substituted for adjudication as the epoch down to, but not beyond, which debts are provable. On this point my learned brother agrees.

Then the next question is whether in the present case, on January 17, 1893, the date of the receiving order, there were mutual demands or sums due which were then capable of being made the subjects of an account for the purposes of set-off under s. 38. It is, of course, immaterial whether the amount of the demand on either side was then ascertained or not. If there was then an existing liability such as is capable of being brought into an account, it is in general immaterial whether

(1) [1895] 2 Q. B. 618.
(2) [1896] 2 Q. B. 491.
(3) (1887) 18 Q. B. D. 459, at p. 463.
(4) [1892] 1 Q. B. 405.

its amount could then have been ascertained, provided it can be ascertained when the account is taken. A liability to do or pay something in futuro will suffice, although the time for doing or paying it has not arrived. In the present case there was at that date no existing liability at all, but merely a contract under which there was a possibility of liability contingent upon things being done which Mant had not by the contract bound himself to do, and contingent on those things, if done, resulting in a profit. Such a contingent liability if it had attached to the bankrupt might have been matter of set-off, because by the express provision of s. 37 it is made the subject of estimation, and the estimated sum would have been a debt provable against the bankrupt unless declared by the Court incapable of estimation. But there is no corresponding enactment compelling a valuation to be made of a merely possible or contingent liability of another person to the bankrupt, and in the absence of any such enactment the difficulty is to see how an account of "sums due" taken with reference to a particular date can include anything in respect of such a merely possible liability. From the earliest times there have been numerous and sometimes conflicting decisions as to the commensurability of cross-demands of various kinds, but in nearly all, if not all, of them there has been an actual existing liability on each side absolute or defeasible, and the question has usually been whether the cross-liabilities are commensurable so as to be capable of being made the subject of an account. It is not necessary to consider in detail the numerous decisions of this kind which are collected in the notes to *Rose* v. *Hart* (1) and *Smith* v. *Hodson* (2); but there are some cases to which reference may be made, though in considering them the successive variations and enlargements of the enactments as to set-off in the Acts of 1825 and 1869 must be borne in mind, as well as the fact that until 1861 (24 & 25 Vict. c. 134, s. 153) unliquidated damages, even for breach of contract, were not in general provable in the bankruptcy. It must also be

(1) (1818) 2 Sm. L. C. 10th ed. 288; 8 Taunt. 499; 20 R. R. 533.

(2) (1791) 2 Sm. L. C. 10th ed. 143; 4 T. R. 211.

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borne in mind with reference to cases relating to insurance that the earlier Acts contained a special provision enabling proof to be made on policies of insurance which had not matured. In *Ex parte Prescot* (1) the bankrupt owed money to a creditor who was liable to the bankrupt on a bond conditional for the payment of money at a date subsequent to the commission. The creditor applied for leave to set off instead of proving for his own claim. Lord Hardwicke said it was a new case to be determined on principles of equity, and he held it a mutual credit because of the immediate obligation of the bond.

In each of the series of cases which terminated with *Rose* v. *Hart* (2) there was on the one side at the time of the bankruptcy a money debt, and on the other side an existing liability on the part of the creditor to account for goods held by him as a bailee, and the only contest was whether the bailment was such as implied a pecuniary liability the amount of which could be ascertained by calculation: see per Tindal C.J. in *Gibson* v. *Bell* (3), where an important mistake in *Rose* v. *Hart* (2) is pointed out. In *Smith* v. *Hodson* (4) and several other cases the liabilities of accommodation acceptors (though unripe at the bankruptcy and though defeasible in case the holder had recovered from the drawer), or the claim of an indorsee of a bill which at the time of the bankruptcy was under discount with his bankers, and therefore not at that time held by him, had before the Bankruptcy Act of 1825 been held matters of set-off; and in *Collins* v. *Jones* (5), which has been approved in the House of Lords (see *M'Kinnon* v. *Armstrong* (6)), it was settled that under the Act of 1825 (6 Geo. 4, c. 16, s. 50) a person who before bankruptcy of the acceptor of a bill or maker of a note had a title to the bill or note, and is the holder of it at the time when the account for the purpose of set-off is taken, does not lose his right of set-off merely

(1) (1753) 1 Atk. 229.

(2) 2 Sm. L. C. 10th ed. 288; 8 Taunt. 499; 20 R. R. 533.

(3) (1835) 1 Bing. N. C. 743; 41 R. R. 660.

(4) 2 Sm. L. C. 10th ed. 143; 4 T. R. 211.

(5) 10 B. & C. 777; 34 R. R. 572.

(6) (1877) 2 App. Cas. 531.

because the bill or note was not in his possession at the time of the bankruptcy. In *Young* v. *Bank of Bengal* (1) the creditor held securities belonging to the bankrupt which were to be applied only for a particular purpose and upon a particular contingency, and for that reason the creditor's liability to account for them was held not matter of set-off, although that liability existed at the time of the bankruptcy. In *Naoroji* v. *Chartered Bank of India* (2) the creditor held bills for collection for the bankrupt, and his liability to account for the proceeds was held to be matter for set-off, although the authority to collect was revocable and the pecuniary liability therefore defeasible. In *Astley* v. *Gurney* (3) the creditor held bills of lading to be returned to the bankrupt; but before bankruptcy the bankrupt authorized the sale of the goods, and it was held that the liability to return the bills which existed before authority given to sell was not commensurable with the creditor's money debt to the bankrupt and could not have been set off, but that on an irrevocable authority being given to sell there was a commensurable pecuniary liability. Under the wider language of the Act of 1869 Malins V.-C., in *Booth* v. *Hutchinson* (4), decided that in an action for rent brought by a bankrupt's trustee the defendant could set off unliquidated damages for breach of an agreement to finish a house, although the amount could not be ascertained until after the bankruptcy. In 1875 the case of *In re Lankester, Ex parte Price* (5), came before James and Mellish L.JJ. This perhaps is the nearest of all the reported cases to the present one. There an insurance company insured a life and lent money to the assured on his policy and went into liquidation. The assured became bankrupt. On the liquidator proving in the bankruptcy for the loan, the assured's trustee sought to set off the value of the policy as valued in the liquidation. It was held that there was no set-off in the bankruptcy on the ground that there was nothing due on the policy, and the valuation of it in the

(1) (1836) 1 Moo. P. C. 150; 43 R. R. 8.

(2) L. R. 3 C. P. 444; 18 L. T. (N.S.) 358.

(3) L. R. 4 C. P. 714.

(4) (1872) L. R. 15 Eq. 30.

(5) (1875) L. R. 10 Ch. 648.

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liquidation did not make the amount of that valuation a sum due. The judgments are as follows (1): "James L.J.: I am of opinion in this case that the official liquidators under the winding-up are clearly entitled to prove for the debt simpliciter against the estate of Dr. Lankester. There is no right" (i.e., before 1875) "of set-off under the Companies Act except that of the common law right of set-off which would be allowed in an ordinary action at law. That being so, according to my view there is no set-off against the claim of Dr. Lankester's trustee under the winding-up in favour of the liquidators. Nor, on the other hand, is the trustee entitled to a set-off in bankruptcy against the claim of the liquidators. The mutual credit clause in the Bankruptcy Act, 1869, enlarged by these words 'mutual dealings,' still requires that there must be something of an account to be taken of what is due upon the one side and what is due upon the other. In that sense there never was anything due from the insurance company in which an account could be taken. It is impossible to say what was due upon the policy when the winding-up commenced any more than that on a subsequent occasion some valuation had been put upon the policy, and that a dividend had been ordered to be paid upon it under the winding-up. But that cannot make it a thing which was due by reason of mutual dealings and transactions between the parties, and you can by no possible construction of the clause bring this in as a debt due on the one side to be set off against a debt due on the other. It is simply that each party will prove for what he can. The proof in the one case will be under the winding-up on the policies, and in the other the proof will be in the bankruptcy upon the debt. When there is a dividend ascertained in both cases, I suppose one sum will be set off against the other."

Mellish L.J.: "I am of the same opinion. It is quite clear that if it had been a solvent company that had lent money to the bankrupt, and the company had never stopped or been wound up and the company had come to prove for the debt due, the trustee never could have claimed a set-off. There would have been no cause of action, and no proof at all. It

(1) L. R. 10 Ch. at p. 650.

does not, in my opinion, make any difference that the company is being wound up. It appears to me that that fact does not bring it within the 'mutual credit' clause. I apprehend that the value of the policies is not a sum due at all, but it is a sum which is arrived at under the winding-up for the purpose of regulating the proof of debts. But it never was a debt, nor is it a sum which ever in the proper sense of the word would become payable as for money due under the mutual credit clause, and I think, therefore, that the liquidators are entitled to prove for the full amount." In 33 L. T. (N.S.) 113, Mellish L.J. is reported as saying: "There must be made out that the value of a policy is a sum 'due' which can be set off against some claims on the other side and under the mutual credit clause." In that case there was at the time of the bankruptcy a certain existing liability to make a payment at an uncertain future time, and it was held not the subject of a set-off, because there was no sum due which could be ascertained or made the subject of an account or set-off. In the present case there is even a greater difficulty of the same kind, and the further one that at the date of Daintrey's bankruptcy there was no existing or certain future liability at all.

In *Peat* v. *Jones* (1) the Court of Appeal (Jessel M.R., Brett and Cotton L.JJ.) approved the decision of Malins V.-C. in *Booth* v. *Hutchinson* (2), and held that there might be a set-off of a claim for unliquidated damages for breach of a contract made before the bankruptcy. This was followed in *Jack* v. *Kipping* (3) in relation to a claim for unliquidated damages for fraudulent representation inducing a contract of sale, and in *Mersey Steel, &c., Co.* v. *Naylor* (4) in relation to unliquidated damages for non-delivery of goods. In *In re Asphaltic Wood Pavement Co.* (5), at the time of the liquidation the company was under contract to keep streets in repair at fixed prices if so required, and the other party was liable for the contract price of laying the streets, and it was held that the cross-claims were the subjects of set-off, although there had been no

(1) 8 Q. B. D. 147.
(2) L. R. 15 Eq. 30.
(3) (1882) 9 Q. B. D. 113.
(4) 9 Q. B. D. 648; 9 App. Cas. 434.
(5) (1885) 30 Ch. D. 216.

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breach before bankruptcy of the company's obligation. In *Eberle's Hotels Co.* v. *Jonas* (1) it was held that there could be no set-off between the liquidating company's liability to pay money and the other party's liability to account for cigars deposited as security for a specific debt, Lord Esher M.R. observing (2) that "an account cannot be taken and a balance struck in respect of a debt on one side and the liability to restore goods on the other." Such claims are incommensurable. In *In re Pollitt, Ex parte Minor* (3), and *In re Mid-Kent Fruit Factory* (4) it was held that a money debt due from the bankrupt could not be set off against an advance of money made by the bankrupt for a specific purpose. In *Palmer* v. *Day & Sons* (5), which was much relied on by counsel for Mant, the only point was the old one whether the bankrupt's liability for money was commensurable with the other party's liability as a bailee of pictures for sale, and *Naoroji* v. *Chartered Bank of India* (6) was followed. In *Elgood* v. *Harris* (7) an underwriter's trustee in bankruptcy sued to recover salvage moneys received by the defendant after the bankruptcy, and which belonged to the bankrupt's estate. The defendant sought to set off the bankrupt's liabilities to him on other policies. It was held by Collins J. that there was no set-off. The salvage was not due at the time of the bankruptcy, but accrued afterwards by operation of law, and it did not result from any credit given by the bankrupt before bankruptcy. The defendant at the time of the bankruptcy had nothing of the bankrupt's in his hands, nor was he then under any contract or liability of which the salvage could be considered to be the proceeds. I have cited all the modern cases except one which seem to have any bearing on the question, and there seems to be nothing in any of them which supports the claim of set-off in a case like the present one. The only case which to my mind causes any difficulty is the *Sovereign Life Assurance Co.* v. *Dodd.* (8) There the company had in 1879 issued to Dodd so-called

(1) 18 Q. B. D. 459.
(2) 18 Q. B. D. at p. 467.
(3) [1893] 1 Q. B. 455.
(4) [1896] 1 Ch. 567.
(5) [1895] 2 Q. B. 618.
(6) L. R. 3 C. P. 444; 18 L. T. (N.S.) 358.
(7) [1896] 2 Q. B. 491.
(8) [1892] 1 Q. B. 405; 2 Q. B. 573.

"endowment policies," which bound them to pay 2000*l.* in May, 1888, to him or his executors, the only condition being that the premiums should be paid. Early in 1887 he borrowed money from the company upon mortgage of the "policies." Afterwards the company was wound up on petition. The "policies" matured after petition, but before the order to wind up, all premiums having been duly paid, some of them after petition. The liquidator brought an action for the money lent, and Dodd pleaded a set-off of the 2000*l.* which had become payable to him before action. It was objected that, inasmuch as the winding-up order related back to the petition, there was not at the commencement of the liquidation any liability on the policies, but only a liability contingent on future payment of premiums. Charles J. allowed the set-off, saying (1): "There was no new transaction. The loans on the one hand and the insurance on the other were both prior in date to the winding-up petition, and there was when the petition was presented a debt due from the defendant, and a contract with him which would probably result—and has in fact resulted—in a debt due to him. . . . There was . . . . a subsisting contract with the company that they would on a day certain (which arrived before the winding-up order) pay the defendant his policy moneys less the amount of his loan. The only element of uncertainty was the possibility that the defendant would not pay his premiums. This element was removed by his duly paying them, and thereupon the sum due to him became capable of proof in the liquidation." The judgment of Charles J. was affirmed by the Court of Appeal. The Court laid stress on the fact that the question arose in an action and not in a proceeding in the liquidation. They refused to consider how the matter would have stood in a proceeding in bankruptcy, or to question the decision in *In re Lankester*. (2) It is plain, therefore, that there is nothing in that case which as a decision governs the present question in the bankruptcy, nor on the facts of that case is there any real similarity to this case. The so-called "policies" were not insurances at all, nor upon any contingency. There at the date of the petition there was, so far as the

(1) [1892] 1 Q. B. at p. 411. (2) L. R. 10 Ch. 648.

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company was concerned an absolute liability to pay the 2000*l.*, in the sense that they could not prevent it from becoming payable. If Dodd chose to pay the one or two remaining premiums the liability must become complete. It cannot be said that there was no existing obligation on the company, nor was any matter of estimation involved. At the date of the petition the amount which the company would have to pay was ascertained, and the amount or value of the unpaid premiums was a simple matter of calculation. In the present case there was no existing obligation on Mant at the date of the receiving order. He was not to come under any obligation unless he chose to do the business and could get the business. In my judgment, in the case of *Sovereign Life Assurance Co.* v. *Dodd* (1), the set-off would have been allowable in bankruptcy as well as in an action. So it might have been in this case if Mant had by the agreement bound himself to do business.

On the whole, therefore, the considerations governing the present case appear to be as follows: The proceeding being in bankruptcy, the question is whether there was a matter of set-off at the time with reference to which the account is to be taken under s. 38—that is, the date of the receiving order. At that date there was no sum due, certain or uncertain, nor any existing liability, and without new and entirely uncertain events and the voluntary action of Mant nothing would become due. Mant could not be compelled at the time of the receiving order to admit any kind of liability as then existing, nor could he have forced the bankrupt or the trustee to accept any valuation or composition. Suppose that on the one hand the agreement had been unlimited in time, and on the other hand the bankrupt's debt to Mant had been so large as to exceed any probable liability of Mant under the agreement during Mant's life or continuance in business, and Mant had proved in the bankruptcy for his whole claim, how could it have been ascertained what sum the trustee could set off? Neither the trustee nor the creditor has any such power given to him to accelerate or value the future and merely possible liability of the creditor as is given in the like case as against the bankrupt. A contract

(1) [1892] 1 Q. B. 405.

to build a ship, or supply coals, or make a street at a time which has not arrived when bankruptcy occurs is an existing liability, the amount of which is then capable of being ascertained with more or less accuracy. But a possibility of liability cannot be valued unless by express enactment, and the statute makes no provision for this in such a case. The decision of Leach V.-C. in *Whitaker* v. *Hall* (1) seems to adopt this view. There the bankrupt at the time of his bankruptcy was indebted to W., and had a prospective claim against her for 2000*l.*, payable at her death. She died after the bankruptcy, and the 2000*l.* was claimed from her representatives. It was held that they could not set off under bankruptcy law the amount of their own claim, because the prospective liability "being payable at the uncertain period of her death was not the subject of computation so as to ascertain the balance within the words of the statute (5 Geo. 2, c. 30, s. 28). It is true that a value might have been set upon the sum payable upon the contingency of W.'s death; so a value might be set upon every sum payable upon a contingency by the bankrupt for the purpose of proof against his estate; but it is enough to say that the law has not provided for such a valuation." The law has now provided for such a valuation in the one case, but not in the other. It is proper to observe that these conclusions are not necessarily applicable to a case in which the cross-demands arise out of one contract or transaction, or are in any manner interdependent. In such a case regard must be had to a new and different consideration. It may well be that the party who comes after the date for the account in bankruptcy to insist on the performance of one of two interdependent obligations must submit on his part to have set off against his claim any cross-claim which has then ripened into an actual liability on the other side of the account. Suppose, for instance, a policy on a sailing ship for a distant voyage or a long period of time. The assured becomes bankrupt owing premiums to the underwriter. Long afterwards a loss occurs and the assured's trustee applies in bankruptcy for payment of the insurance money to the credit of the estate. It would be hard if the underwriter is

(1) (1822) 1 Glyn & J. 213.

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not to have credit for the premiums owing to him. In such a case, and in many others which might be put, the account might well be carried down to a date later than that which is primâ facie the proper one. A principle of this kind seems to be indicated by the judgment in *Elliott* v. *Turquand* (1), and *In re Lankester* (2) is not inconsistent with it, for there no liability on the policy had ripened at the time when the question arose. In *Beckwith* v. *Bullen* (3) the Court thought that in bankruptcy there might be a set-off between premiums and immature liabilities upon a policy. And a remarkable decision of all the judges in Lord Ellenborough's time in *Graham* v. *Russell* (4) points in the same direction. There a shipowner became bankrupt owing for premiums. After the bankruptcy the ship was lost, and the shipowner sued the underwriter, who sought to set off the premiums due, and it was held that he might do so, because the Act (19 Geo. 2, c. 32) had expressly enacted that a person insured before bankruptcy of the underwriter might prove for losses happening after the bankruptcy, and the Court thought that, as the epoch for taking the account was thus brought down for the one party, it ought to be brought down for the other also.

But where, as in the present case, the cross-demands are separate and independent, I see no ground of equity or reason for altering the date which the statute indicates as the date with reference to which the account is to be taken for the purpose of set-off.

In my opinion, the trustee's claim must be allowed with costs.

The following judgment was read by

BIGHAM J. The question in this case is whether certain transactions between the appellants Messrs. Mant & Mant and the bankrupt Daintrey come within the mutual credit section (s. 38) of the Bankruptcy Act, 1883. The county court judge held that they did not, and from that decision Mant & Mant appealed.

(1) 7 App. Cas. 79.
(2) L. R. 10 Ch. 648.
(3) 8 E. & B. 683.
(4) (1816) 5 M. & S. 498; 17 R. R. 414.

The facts are as follows: Mant & Mant were solicitors at Petworth, in Sussex. Daintrey was a solicitor in the same place. Daintrey owed Mant & Mant 86*l.* for money paid by them at his request. After this debt had been incurred, namely, on December 24, 1892, Daintrey committed an act of bankruptcy, of which, however, Mant & Mant had no notice. On December 31, 1892, Daintrey sold his practice to Mant & Mant. The agreement for the sale was in writing, and it is described as "Heads of agreement as to the acquisition by Mant & Mant of the practice hitherto carried on by Daintrey at Petworth." The price to be paid by Mant & Mant for the purchase of the business was to be "a sum equivalent to the usual agency share of profits in respect of business transacted for persons for whom Daintrey is now acting . . . . such sum to be payable for three years only, and to be ascertained annually on the 1st of January in each year." Accordingly, Mant & Mant took possession of the practice, and commenced to carry it on.

After they had so taken possession, namely, on January 17, 1893, a receiving order was made against Daintrey, and then for the first time Mant & Mant discovered that he had committed an act of bankruptcy. Three years elapsed, and at the end of that time there was due and payable by Mant & Mant under the agreement 300*l.*, that being the equivalent of the usual agency share of profits, as mentioned in the agreement. In other words, the price to be paid for the purchase of the business was then ascertained at the sum of 300*l.* Thereupon the trustee in Daintrey's bankruptcy called on Mant & Mant to pay, and they did pay, first deducting, however, the 86*l.* due by Daintrey to them. The trustee objected to this deduction, alleging that the 300*l.* ought to be paid in full, and that Mant & Mant ought to be satisfied to take a dividend on the claim for 86*l.*

I am of opinion that Mant & Mant are entitled to deduct the 86*l.* due to them by Daintrey from the 300*l.* due by them under the agreement. The law regulating the adjustment of cross-claims between a bankrupt and his creditors is statute law, and is to be found exclusively in s. 38 of the Bankruptcy Act, 1883.

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The terms of this section seem to me to cover the case before the Court. The dealings are mutual—that is to say, they are in the same right, and they are between a debtor against whom a receiving order has been made, and a creditor claiming to prove a debt under the receiving order—that is to say, having a right to prove a debt in the bankruptcy proceedings initiated by the receiving order.

It was argued for the respondents that the account directed to be taken by s. 38 must be taken as at the date of the receiving order, and it was said that, inasmuch as there was nothing payable by Mant & Mant at that date, no such account could possibly be taken, and that therefore the case did not fall within the section.

The judgment of Lord Selborne in *In re Milan Tramways Co., Ex parte Theys* (1), was referred to as supporting the contention. That case has nothing to do with the point now under consideration; but in his judgment Lord Selborne, referring to the mutual credit section of the Bankruptcy Act of 1869, said (2): "The line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate, as the case may be." The answer to this argument is that the appellants are not seeking to alter the rights of the parties by reference to subsequent transactions, but are seeking to ascertain them by reference to the natural outcome of previous transactions, and Lord Selborne's observations, so far from supporting the respondent's contention, seem to me to shew that the account which the section of the Act directed should be taken is to be taken when the claim on the one side or the other is presented. In the case before the Court there are no subsequent transactions; the debt on the one hand, and the agreement out of which the cross-debt arises on the other hand, both came into existence before the date of the receiving order, and the account must, in my opinion, be taken

(1) 25 Ch. D. 587. (2) 25 Ch. D. at p. 591.

by placing the one debt against the other and ascertaining the difference.

The judgment of Charles J. in *Sovereign Life Assurance Co.* v. *Dodd* (1), I think, supports the appellants' view. The facts, so far as they are material for the purpose in hand, were as follows: Dodd had in 1879 effected two policies of insurance on his own life with the plaintiff company. Under the policies he became entitled to two payments of 1000*l.* each if he lived until May 7, 1888. He paid the premiums for many years, and then borrowed from the company a sum of 1170*l.* on the security of the two policies. In August, 1887, a petition was presented against the company, and it was ordered to be wound up. In December, 1890, the liquidator sued Dodd for the 1170*l.*, and the question was, whether the defendant was entitled to set off so much of the two sums of 1000*l.* then due to him as would be sufficient to meet the claim for 1170*l.* Charles J. held that he was so entitled. It was argued for the plaintiffs that, inasmuch as the claims on the policies did not mature until the commencement of the liquidation, there were no mutual dealings within s. 38 of the Bankruptcy Act, 1883, and that therefore the set-off could not be pleaded. But Charles J. dismissed the contention. It was enough, he said, that there existed at the commencement of the liquidation a debt on the one hand and a liability, which in due course would mature into a debt, on the other. He noticed the suggestion that a line should be drawn at the date of the commencement of the liquidation (a date which corresponds with the date of the receiving order in a bankruptcy), and he pointed out that this is true to the extent of excluding new transactions, but not to the extent of excluding the consequences of previous transactions. He says (2): "There was no new transaction. The loans on the one hand, and the insurance on the other, were both prior in date to the winding-up petition, and there was when the petition was presented a debt due from the defendant, and a contract with him which would probably result and has in fact resulted in a debt due to him." It may be said that the case of the *Sovereign Life*

(1) [1892] 1 Q. B. 405. (2) [1892] 1 Q. B. at p. 411.

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Assurance Co. v. *Dodd* (1) is not the same as, but rather the converse, of the case now before us, because there Dodd was the debtor of the company before the liquidation and became the creditor afterwards, whereas in the present case Mant & Mant were the creditors before the bankruptcy and became the debtors afterwards. But this, in my opinion, makes no difference. There was a case decided under s. 39 of the Bankruptcy Act, 1869—*Booth* v. *Hutchinson.* (2) In that case Booth was tenant of a house to Greetham at a time when Greetham became a bankrupt. At the commencement of the bankruptcy Greetham owed money to Booth. Booth continued as tenant after the commencement of the bankruptcy for some time, and so became liable to pay rent. He might have terminated his tenancy by notice if he had chosen to do so, but in fact he allowed the tenancy to continue. The trustee in the bankruptcy sought to recover the rent without allowing Booth to set off the debt due by Greetham. It was held that the set-off should be allowed, and that in taking the account the debt due by the bankrupt on the one hand should be placed against any rent which might become due "before the close of the bankruptcy—that is, before the distribution of the estate," on the other hand. The ground of the decision was that the rent arose out of a contract of tenancy entered into before the bankruptcy. The case of *Palmer* v. *Day & Sons* (3) was decided upon s. 38 of the present Bankruptcy Act. In that case the bankrupt Langton owed a debt to Day & Son, who were auctioneers. At the date of the receiving order Day & Son held some pictures belonging to the bankrupt, which they had received from him with a revocable authority to sell them on his behalf. After the date of the receiving order the trustee gave directions to Day & Son to sell the pictures, which they accordingly did. They paid to the trustee the proceeds of the sale, after deducting the amount of the debt due to them by Langton. The Court held that they were entitled to deduct the amount of the debt due to them upon the ground that the transactions were mutual dealings within the meaning

(1) [1892] 1 Q. B. 405. (2) L. R. 15 Eq. 30.
(3) [1895] 2 Q. B. 618.

of the Act. Both in *Booth* v. *Hutchinson* (1) and in *Palmer* v. *Day & Sons* (2) there was a debt due by the bankrupt before the bankruptcy, and there was a debt which fell due to the bankrupt's estate after the commencement of the bankruptcy arising out of contracts entered into before the bankruptcy. In neither case could any account have been taken at the commencement of the bankruptcy, for it was quite uncertain whether anything, and if anything how much, might become due to the bankrupt's estate; yet the account was allowed to be taken when the demand against the creditor on the estate was put forward. The Court, in their judgment in *Palmer* v. *Day & Sons* (2), said there was a debt on the one side and a delivery of property with directions to turn it into money on the other. (3) So, in the present case, there was a debt due by Daintrey on the one side, and there was a transfer by him of his business on the terms that it should be worked so as to produce money payable to him on the other. Thus the cases seem to be identical.

For these reasons I think that the appeal should be allowed.

WRIGHT J. As we differ in opinion, the judgment appealed from will stand.

Appeal dismissed. Leave to appeal given.

A. P. P. K.

Mant appealed to the Court of Appeal.

The appeal was heard on November 10, 1899.

Dickens, Q.C., and *Hohler*, for the appellant. The appellant submits that Wright J. took an erroneous view of the agreement, and that a right of set-off exists under it. Sect. 38 of the Bankruptcy Act, 1883, precisely covers this case. If there is a debt due to the bankrupt at the date of the receiving order, and there is also at that date a liability on the part of the bankrupt which may or may not ripen into a debt, there is a right of set-off.

(1) L. R. 15 Eq. 30. (2) [1895] 2 Q. B. 618.
(3) [1895] 2 Q. B. at p. 623.

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Herbert Reed, Q.C., and *Mackintosh*, for the trustee. There were no "mutual dealings" within the meaning of the section between Daintrey and Mant. The agreement did not impose on Mant any obligation either to pay anything or do anything. It was not a purchase deed, and indeed the word "purchase" was not mentioned: it was nothing more than what it is described on the face of it—a deed of "arrangement."

LINDLEY M.R. I do not think we shall gain anything by taking time to consider this case or hearing a reply. I cannot help thinking that there is an error in the judgment of Wright J., and that the view taken by Bigham J. is correct. I agree with that part of Wright J.'s judgment in which, after an examination of the authorities, he came to the conclusion that the date of the receiving order, and not the date of the commencement of the bankruptcy, was the time for ascertaining what mutual debts, credits, and dealings were existing between the debtor and other persons. But I cannot follow him in his second step—that there were at that date no mutual debts, credits, or dealings between Daintrey and Messrs. Mant & Mant. The case stands in this way. Daintrey owes Messrs. Mant 86*l.* On the other hand, Messrs. Mant have become liable under the document described as "Heads of Agreement," and which is dated December 31, 1892, to pay Daintrey various sums, amounting altogether to about 300*l.*, under certain conditions, and whatever is payable to Daintrey by them is payable under this document. Looking at this agreement, I fail to see that at the date of the receiving order there was nothing payable under the agreement. Under the circumstances it is clear that when this agreement was executed very considerable sums would become payable under it. Then there was this debt due from Daintrey to Messrs. Mant before the bankruptcy, and which would have become payable by Daintrey if there had been no bankruptcy. Why it should not be set off against the debt due to him by Messrs. Mant, notwithstanding the bankruptcy, I cannot understand. How can the trustee insist upon having 20*s.* in the pound from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due

to them from Daintrey? Such a contention is, in my opinion, unarguable. It is to remedy such an injustice that the provisions of the old bankruptcy law have been recast, and the point has been dealt with by the mutual credit provisions in s. 38 of the Bankruptcy Act, 1883. It appears to me to be quite true that when the trustee makes a claim against a person, the bankruptcy proceedings to ascertain a claim do not apply. The machinery of the Act deals with the case of a claim against "the estate." Looking at the mutual credit clause in the Bankruptcy Act, it is quite obvious that, inasmuch as there is no machinery for ascertaining what amount Messrs. Mant have to pay, the operation of the clause cannot be excluded. I cannot help thinking that Wright J. was in error in the construction he put on this agreement. He thought that Messrs. Mant were under no obligation towards Daintrey. I agree that Messrs. Mant were not bound to do business for all the clients of Daintrey, and above all that no client of Daintrey's was bound to do business with them; but that Messrs. Mant were bound in certain conditions to pay this money to Daintrey is clear.

I think the view of Bigham J. is right, and that this is a case in which s. 38 applies. The appeal must, therefore, be allowed.

SIR F. H. JEUNE P. I agree.

ROMER L.J. I agree with Wright J. that the date of the receiving order is the proper date to look at for the purpose of seeing whether there were mutual dealings between Daintrey and Messrs. Mant upon which this agreement was made, and whether those mutual dealings gave rise to any right of set-off. There was a certain sum due from Daintrey to Messrs. Mant. On the other hand, Messrs. Mant were under a liability to Daintrey by virtue of the agreement of December 31, 1892. I agree that the amount which ultimately became payable by them could not be ascertained until some time later than the date of the receiving order, and it was possible that the amount might be very small; but, whatever sum eventually became

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payable, became payable to Daintrey by virtue of this agreement of December 31, 1892, and of nothing else. For Messrs. Mant to obtain the advantage of the mutual credit clause, it was not necessary that the money payable under the agreement should be immediately payable to the bankrupt at the date of the receiving order; nor were the circumstances such that the account could be taken as between Messrs. Mant and the bankrupt at that date. It is quite sufficient if the account can be taken when the set-off arises. Here the trustee is claiming money from Messrs. Mant by virtue of an agreement between Daintrey and Messrs. Mant entered into before and existing at the date of the receiving order, and there have been no dealings between Messrs. Mant on the one hand and the bankrupt and his trustee on the other outside that agreement. So that when the trustee comes and says to Messrs. Mant, "Pay me the sum due to me under this agreement," I do not see why Messrs. Mant should not set off against that claim the sum due to them from the bankrupt's estate. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Palmer & Bull, for Mant & Mant, Petworth; Nash, Field & Co., for Stuckey, Son & Pope, Brighton.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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Jan. 27.

MAUDE *v.* BROOK.

Employer and Workman—Compensation—Building constructed by means of a Scaffolding—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

A new house more than thirty feet high had been roofed in and workmen employed by the builder were plastering the walls and ceilings inside the house, for which purpose trestles and boards were being used. One of the men, while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, and was killed. At that time other workmen were at work plastering some of the rooms, and were standing on boards placed across trestles four feet high in order to enable them to reach the ceilings and upper part of the walls. A county court judge having awarded compensation to the widow of the deceased:—

Held, by A. L. Smith L.J. and Rigby L.J. (Collins L.J. dissenting), that there was evidence to justify a finding of the county court judge that the arrangement of trestles and boards was a scaffolding within the meaning of s. 7, sub-s. 1, of the Act, and that the employment of the deceased was therefore one to which the Act applied.

APPEAL from a decision of the judge of the Leeds County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent was the widow of a plasterer who was killed while in the employment of the appellant, a master plasterer. The appellant was building two houses which were more than thirty feet high; they had been roofed in at the time of the accident, and the external scaffolding had been removed. The deceased and other men in the appellant's employment were engaged upon the inside plastering work, and in order to enable the plasterers to reach the ceilings and upper parts of the walls in the various rooms boards were placed upon trestles about four feet high, and upon these boards the men stood when necessary for the purposes of their work. At the time

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of the accident an arrangement of this kind was in fact being used by the deceased's fellow-workmen in some of the rooms, but not by the deceased himself. When he was last seen, the deceased was standing on the floor of the top landing, plastering the wall and smoothing the surface with a "float." Shortly afterwards he was found lying at the bottom of the staircase fatally injured, having fallen down the well of the staircase, which was unprotected by banisters. The learned county court judge held that the plastering of an unfinished house was construction within the meaning of the Workmen's Compensation Act, 1897, that the arrangement of trestles and boards was a scaffolding, and that, although the deceased was not himself using the scaffolding at the time of the accident, he had nevertheless been killed by an accident arising out of and in the course of his employment by the appellant upon a building exceeding thirty feet in height which was being constructed by means of a scaffolding; he therefore made an award for 296*l.* in favour of the respondent.

The employer appealed.

Ruegg, Q.C., and *Arthur Powell*, for the appellant. The employment of the deceased was not an employment to which the Act applies, for the deceased was not employed upon a building more than thirty feet high which was being constructed by means of a scaffolding. By "scaffolding" the Legislature intended the kind of scaffolding which is ordinarily used in building operations, and not a mere arrangement of trestles and boards inside a room.

[A. L. SMITH L.J. Why should the scaffolding not be inside the building? The inside of a cathedral might surely be repaired by scaffolding.]

That point was raised in *Hoddinott* v. *Newton, Chambers & Co.* (1), but it was unnecessary to the decision. The accident, the scaffolding, and the building over thirty feet high must all be in some relation to each other, and there must be scaffolding of such a height as to enable a building over thirty feet high to be constructed or repaired by means of that scaffolding. Here

(1) [1899] 1 Q. B. 1018.

the building was not being constructed within the meaning of the Act, for the exterior scaffolding, by means of which the house had been made thirty feet high, had been taken down. Further, the respondent was not an undertaker within the meaning of the Act.

Compston, for the respondent. There was evidence on which the county court judge could properly find that the arrangement was a scaffolding within the meaning of the Act. It is not essential that there should be scaffold poles in order to constitute a scaffolding; it is enough if something is used that does as well and is more convenient. The ceiling could not possibly be plastered without a scaffolding of some sort, and, as scaffold poles were useless in a room of the height, trestles were used in their place. In Webster's Dictionary "trestle" is defined as "a movable frame or support for anything, as scaffolding"; and the Century Dictionary definitely mentions "scaffolding" as being used by plasterers inside houses. The height of thirty feet probably was taken from s. 23, sub-s. 2, of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), and from the schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28).

Ruegg, Q.C., in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. The question whether the appellant was the actual builder or not is not open to him; it was not taken at the trial, as it should have been in order to enable the respondent to give evidence upon the point. It is clear that two houses were being built by or for the appellant, who must be taken to have been the builder, and that the deceased man was engaged by him to do the plastering work upon the house. At the time of the accident the plastering work was not completed; the greater part of it had, indeed, still to be done. The deceased was engaged in plastering the walls and ceilings, which was done in the ordinary way by putting the plaster on laths and smoothing it down with a float; he was working on the landing at the top of the stairs, the railing had not been put up, and he fell down through the opening. The first question is

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whether this house was being constructed or repaired at the time of the accident, and this question seems to admit of only one answer: it was being constructed, for the men were engaged upon work which was part of the process of construction; the county court judge was therefore right in holding that the deceased was employed upon a building which was being constructed at the time of the accident. I may add that it was over thirty feet high. Then comes the question whether it was being constructed by means of scaffolding. The Act applies to employment "on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." There is no provision in that section, or in any part of the Act, that, where a building over thirty feet high is being constructed by means of scaffolding, the scaffolding itself must be thirty feet high, and there is nothing to confine the right to compensation in such a case to a fall off scaffolding.

The question then comes to this: Was this house being constructed by means of a scaffolding within the meaning of s. 7, the scaffolding which was employed being in fact used inside the house for the purpose of plastering the ceilings? The rooms are said to have been nine feet high, and the scaffolding consisted of movable trestles inside the rooms with boards laid across the top. We have already held in *Hoddinott* v. *Newton, Chambers & Co.* (1) that it is immaterial whether the scaffolding is inside or outside the building. It is possible to imagine a building over thirty feet high built from the outside by means of an arrangement of trestles and boards, the trestles being so tall as to require a ladder in order to enable the workmen to get on to them: in such a case would there be evidence on which the judge might find that the means by which the house was being constructed was by scaffolding? I cannot say that there would not be evidence which would justify such a finding. We have already said that we can lay down no comprehensive definition of what is scaffolding; but we can say whether there is any evidence in each particular case on which it could properly be held that the arrangement in use was scaffolding. In

(1) [1899] 1 Q. B. 1018.

the present case the trestles and boards, if used outside, would, I think, have been scaffolding; they were, however, being used inside the house to finish off certain work of construction which it was necessary to complete. I cannot think that as a matter of law we can hold that this was not scaffolding, for scaffolding may differ greatly in different cases. In *Hoddinott* v. *Newton, Chambers & Co.* (1), the arrangement was one of trestles and boards, and it was contended that it was not scaffolding because there were no upright posts to which it was attached, the iron pillars of the building being used in their place. The learned county court judge found in that case that the combination of boards, ledgers, and iron columns was scaffolding within the meaning of the Act, and this Court declined to interfere with his finding. In the present case it seems to me impossible to say that there was no evidence to justify a finding that this arrangement of trestles and boards was scaffolding, and it is immaterial that it was inside the house. Many cases may, it is true, be suggested to shew somewhat ridiculous results which may arise under s. 7; but that cannot affect its true interpretation. In my judgment, the proper answers to the questions which arise in this case are that the building was being constructed, that it was thirty feet high, that it was being constructed by means of scaffolding, and that the deceased was employed upon it by the appellant. The decision of the county court judge was therefore right and should be upheld.

RIGBY L.J. I am of the same opinion. In construing the Act we are not at liberty to confine the meaning of the word "scaffolding" to that which is its most usual form: anything, whether usual or unusual, that can properly be called scaffolding is within the Act. Let us suppose a building in course of construction which is thirty feet high, with a wall on each side of the site, the builder having control of both the walls. In such a case it would be unnecessary for the builder to go to the useless expense of the ordinary arrangement of scaffold poles, &c.; all that he would want for the purpose of the

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construction of the building would be planks laid across from one wall to the other; under such circumstances I cannot doubt that he would be using scaffolding, although there would be no scaffold poles or trestles. It has been suggested that the provisions of s. 7 as to buildings have been taken from the Notice of Accidents Act, 1894; and on turning to that Act we find a very wide provision indeed. Under it notice has to be given of accidents occurring in the employments specified in the schedule, which not only includes a building exceeding thirty feet in height which is being constructed or repaired by means of a scaffolding, but goes on to include a building exceeding that height upon which more than twenty persons, not being domestic servants, are employed for wages. I cannot profess to understand why the latter case should be one in which notice of accident should be given, but so it is; I can only imagine that it was taken as a rough but sufficient test of the importance of the work. In the present case too, a rough test of the importance of the work seems to have been adopted by the Legislature. We have already held that it is immaterial for the purposes of this Act whether the scaffolding is inside or outside the building, and I think it is not necessary that the accident should have happened by reason of the scaffolding—that is, it need not involve the falling of any one or anything on or from the scaffolding; if we once get a house being constructed by means of scaffolding, any accident happening to a workman employed by the undertakers upon that building would be within the Act. I agree that in the present case the county court judge had a perfect right to find that this arrangement of trestles and boards was scaffolding within the meaning of the Act, and I think that this appeal should be dismissed.

COLLINS L.J. I regret that I am unable to concur in the view that has been expressed by the majority of this Court. I could not, however, do so without retracting my opinion in *Hoddinott* v. *Newton, Chambers & Co.* (1), and after careful reconsideration of my judgment in that case I feel bound to adhere to all that I there said. It is not necessary for me to

(1) [1899] 1 Q. B. 1018.

repeat at length my remarks in that case. The only safe rule for us to follow in construing this section is to give the words their ordinary and popular meaning, having regard, of course, to the context in which they are used. Reading the section with due regard to the context, I cannot persuade myself that a board laid upon trestles inside a room is within the meaning of the word "scaffolding" as used in the section. No uninstructed person would, in my judgment, think of calling such a temporary erection a scaffolding at all; certainly he would not look upon it as a scaffolding by means of which a building upwards of thirty feet high could be constructed or repaired. In my opinion, the connection in which the word "scaffolding" occurs in s. 7 points to some structure of planks and supports capable of being used in the construction or repair of a building. I do not deny that the scaffolding contemplated by the section may be used either inside or outside the building; I doubt whether such scaffolding as is contemplated by the Act can be brought within a single room for the purpose of plastering the walls or ceiling. I doubt whether planks and trestles used inside a room for the purpose of plastering it, there being no scaffolding in the popular sense of that word outside the building, can be held to be covered by the word "scaffolding" in s. 7 of the Act.

In my opinion, the question whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law; it is a question on which the Court must give some guidance, and in the case of *Hoddinott* v. *Newton, Chambers & Co.* (1) I attempted to give some indication as to the sort of direction that should be given. As to the present case, so far as it is governed by authority, I will refer shortly to the previous decisions in this Court, for I claim that they support my view. In *Wood* v. *Walsh* (2) there was a ladder outside a house which was connected with the window-sill by a board resting on the sill and on a rung of the ladder; it was contended that that was scaffolding within the Act, and, if the board and two trestles in the present case are held to be scaffolding, I cannot

(1) [1899] 1 Q. B. 1018. (2) [1899] 1 Q. B. 1009.

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see why the ladder and board reaching to the window-sill are not equally so. In that case my Lord said: "Then, it was further contended that in this case the building was being constructed or repaired 'by means of a scaffolding.' Is a ladder 'scaffolding?' The question has only to be put in order to be answered, for no man in his senses who wanted his house repaired by means of a ladder would say that he wanted it done by means of scaffolding; if he wanted scaffolding used he would say so. In my judgment, this case does not come within the section at all. It has been contended that the attachment of a plank to a rung of the ladder made it a scaffolding; that however is a question of fact, and the arbitrator found that it did not, and I agree with him." In what is there said I entirely agree. In that case I simply said that it was not necessary then to define scaffolding, though we might some day have to do it.

Then came the case of *Hoddinott* v. *Newton, Chambers & Co.* (1), where there was an arrangement of trestles and ledgers with boards resting on them, and tied to the upright iron pillars inside the building. My Lord held that arrangement to be scaffolding; but this was unnecessary to the decision, which went upon the ground that the work being done was neither construction nor repair. I held that it was not scaffolding; and Romer L.J. seems to have held the same view; at any rate, he did not hold that it was scaffolding, for he says in his judgment: "It would be dangerous to attempt to define with exactness the meaning of the words used in that sub-section; but in construing the language as to the height of the building, regard must be had to the words 'construction,' 'repair,' and 'scaffolding'; they should not be considered separately, but together, for they have a mutual bearing and effect upon each other." As I read that passage, it is not a decision that the arrangement there used was scaffolding.

The result of holding the arrangement used in the present case to be scaffolding must lead to very strange results, which it is difficult to suppose can have been within the contemplation of the Legislature. It is admitted that the section will

(1) [1899] 1 Q. B. 1018.

cover a person in the employ of a builder who meets with an accident which has no relation with the scaffolding in any sense, which happens while the man is not on the scaffolding and is not hit by anything falling from it; and it must follow from that that if in a house, the construction of which is completed except as to the internal plastering, a single painter is engaged at his work on a board supported by two trestles or chairs, and another workman injures himself by stumbling up or falling down the stairs, the latter is within the purview of the Act. This follows from his employment by the undertakers, as defined by the Act, "on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding," for the building would in such a case be in course of construction by means of a scaffolding. In my opinion, the word "scaffolding" as used in this Act indicates that there must be one system of scaffolding for the whole building, which is capable of being used for its construction or repair as a whole. For these reasons I think that this appeal should be allowed.

A. L. SMITH L.J. I wish merely to add one remark. In the case of *Hoddinott* v. *Newton, Chambers & Co.* (1) I did not hold that the structure was a scaffolding; all I held upon that point was that there was evidence for the county court judge, and I expressly said: "I cannot say that there was no evidence that the structure used was a scaffolding, and the county court judge found that it was one." And in *Wood* v. *Walsh* (2) I thought that the evidence justified the arbitrator's finding, and expressed my agreement with it.

Appeal dismissed.

Solicitors for appellant: *W. Hurd & Son, for H. A. Child, Leeds.*

Solicitor for respondent: *G. Trenam, for Milling & Dodgson, Leeds.*

(1) [1899] 1 Q. B. 1018. (2) [1899] 1 Q. B. 1009.

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[IN THE COURT OF APPEAL.]

SYKES AND ANOTHER *v.* SOWERBY URBAN DISTRICT COUNCIL.

Local Government—Sewer—Vesting in Local Authority—"Sewers made by any Person for his own Profit"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-s.* 1.

A drain was made by the owner of a quarry for the purpose of collecting and carrying off surface water coming on to his land and preventing it from running over the quarry. By means of the drain the quarry could be more economically and conveniently worked than if the water were allowed to spread over it:—

Held, that the drain was a sewer made by a person for his own profit within the meaning of s. 13, sub-s. 1, of the Public Health Act, 1875, and did not vest in the local authority of the district.

Decision of the Queen's Bench Division, [1899] 1 Q. B. 979, reversed.

Croysdale v. *Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515, approved.

APPEAL from the judgment of a Divisional Court, reported [1899] 1 Q. B. 979.

The action was brought in the county court of Yorkshire holden at Halifax, and the facts as they appeared on the notes of the county court judge were as follows:—

About twenty years ago a drain was constructed by the plaintiffs' predecessors in title to collect into one channel the surface and rain water which came down a road called Carr Lane on to the plaintiffs' land, in order to prevent its running over the plaintiffs' quarry. Subsequently the plaintiffs twice altered the course of their drain. This drain or "sough" ran across the land of the plaintiffs, and so into a public sewer on the far side, into which it discharged. The defendants turned a current of water, which it was not denied was polluted, into this sough. The plaintiffs alleged that this was a wrongful act, and caused damage to them by reason of percolation through their rubble drain into the quarry, rendering the stone wet and

causing greater expense in working the quarry, and they claimed damages and an injunction. The learned judge decided that the sough was a sewer within the definition in s. 4 of the Public Health Act, 1875 (1), and as a sewer would vest in the defendants unless it came within one of the exceptions in s. 13 of the Act. (2) He found that the drain or sewer was constructed for more economically and conveniently working the quarry, so that the land might be worked more profitably. That the water for the conveyance of which the drain was made was mostly if not altogether rain water, so that the rubble drain was sufficient to carry it off, as the rainfall was intermittent. He held that the drain, not having been made for sanitary or ordinary drainage, but for the more beneficial use and occupation of the land, was such a sewer as was contemplated in the framing of the statute as having been made for the profit of the owner or occupier, and was, therefore, within the exception of s. 13, and did not vest in the local authority, and that consequently the defendants had no right to discharge water into the drain. He found that injury had been caused by the acts of the defendants, and he gave judgment for the plaintiffs for damages and granted an injunction.

(1) 38 & 39 Vict. c. 55, s. 4: "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

(2) Sect. 13: "All existing and future sewers within the district of a local authority, together with all buildings, works, materials and things belonging thereto, except

"(1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders; and

"(2.) Sewers made and used for the purpose of draining, preserving or improving land under any local or private Act of Parliament, or for the purpose of irrigating land; and

"(3.) Sewers under the authority of any commissioners of sewers appointed by the Crown

shall vest in and be under the control of such local authority."

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On appeal the Divisional Court (Darling and Channell JJ.) reversed the decision of the county court judge. (1)

The plaintiffs appealed.

Feb. 21. *Butcher, Q.C.*, and *T. F. Byrne*, for the plaintiffs. Assuming that the drain in question was a "sewer" within the definition given by the Public Health Act, 1875, s. 4, it was within the exception mentioned in s. 13 of that Act as being a sewer made by the plaintiffs' predecessors in title "for their own profit." It may be doubted whether the definition in the Act was really intended to include any but sanitary sewers, i.e., sewers made for the purpose of carrying off sewage, storm water from streets, or suchlike purposes. But, however that may be, it is submitted that it was clearly intended to except from the operation of the Act such a sewer as this, which was constructed by a landowner merely for the more profitable occupation of his land. The county court judge has expressly found that this sewer was made for more conveniently and economically working the quarry. If such a drain as this is a sewer within the Act, it would follow that every drain made for agricultural purposes for the drainage of land would come within the Act and would vest in the sanitary authority and be repairable by them. It is not necessary, in order to bring a sewer within the exception, that any direct pecuniary profit should be derived from it, or even that the water carried off by it should be used for any profitable purpose. It is sufficient that it should be made for the purpose of getting rid of water and so rendering land more profitable or the user of it more convenient and less expensive. The case of *Croysdale* v. *Sunbury-on-Thames Urban Council* (2) is an authority in the plaintiffs' favour: see also *Minehead Local Board* v. *Luttrell*. (3) The cases in which sewers made by persons for the drainage of houses on their own land have been held not to be sewers made for their own profit within the exception, such as *Bonella* v. *Twickenham Local Board* (4), *Ferrand* v. *Hallas Land and Building Co.* (5), and *Acton Local Board* v. *Batten* (6), are

(1) [1899] 1 Q. B. 979.
(2) [1898] 2 Ch. 515.
(3) [1894] 2 Ch. 178.
(4) (1887) 18 Q. B. D. 577; 20 Q. B. D. 63.
(5) [1893] 2 Q. B. 135.
(6) (1884) 28 Ch. D. 283.

distinguishable. There the primary object of the sewers is a sanitary object, namely, the getting rid of a nuisance and not profit. It is obvious that such sewers could not have been intended to be within the exception, because, if so, it would to a very large extent have nullified the operation of the section, inasmuch as many sanitary sewers were originally made by private persons for the drainage of their house property. It is a reasonable construction of the Act to hold that a sewer cannot be said to have been made for a person's private profit where it was made for the sanitary purposes which are required to be provided for by the Act. But to hold that a sewer like the present, which was merely made for the purpose of carrying off water from a quarry, and which cannot be distinguished in point of principle from an ordinary agricultural drain, vests in the sanitary authority and is repairable by them cannot be correct.

[They also cited *Reg.* v. *Godmanchester Local Board.* (1)]

Lawson Walton, Q.C., and *W. J. Waugh*, for the defendants. Agricultural drainage does not come within the purview of the Act, but this is a different case. Here there was a nuisance by reason of the water which came into the quarry, and to get rid of that the plaintiffs constructed an artificial work and connected it with a public sewer. If this work is not within the definition of a drain it comes within that of a sewer, and is not covered by the exceptions. The only exception that could be applied is that the sewer was made for the plaintiffs' own profit; but the word "profit" must be taken to mean direct profit, otherwise every pipe, even one inside a house, would be included, since a pipe for carrying refuse water of sewage from a house is an advantage to the person who puts it up, and so is indirectly profitable to him. If such a sewer as this is from its nature within the first exception, the second exception would not be necessary.

A. L. SMITH L.J. This is an appeal from the judgment of a Divisional Court given with some hesitation in favour of the defendants.

(1) (1866) L. R. 1 Q. B. 328; 5 B. & S. 936.

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It appears that some years ago the plaintiffs' predecessors in title, in order to carry off the surface water coming down a road called Carr Lane and prevent its running over their quarry, cut a hole in a wall at the foot of the lane, and made what is called a sough through their land to carry off the water and deliver it into a sewer on the far side, and there is evidence that from time to time the site of this drain was moved. Latterly the defendants laid down a pipe to Carr Lane and turned a current of water into it. They also connected with the pipe some drain-pipes into which house sewage flowed, which in this way got into the plaintiffs' sough and polluted the water which ran over their land. The plaintiffs asserted that this did harm to their quarry, and they brought this action for damages and an injunction. The defence set up was that the sough was a sewer which vested in the defendants as local authority under s. 13 of the Public Health Act, 1875, and that they were justified in what they did.

The county court judge came to the conclusion that the drain or sough, as it was called, was a sewer, but that it was made for the plaintiffs' own profit, and thus came within the exception in s. 13, and did not vest in the defendants. I agree with the county court judge and the Divisional Court that this sough was a sewer within the meaning of the Act. I say nothing about a mere agricultural drain, except that it would take a great deal to drive me to hold that such a drain, made merely for the purpose of draining a field, is a sewer. The difficulty, if there be one, arises under the definition section of the Act of 1875. Sect. 4 defines a drain, and it is clear that this sough does not come within that definition. The difficulty does not arise on that clause, but on the definition of the word "sewer." By that definition "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." This sough is certainly a drain. It is true that it is a drain for the purpose of carrying off water, but, speaking

for myself, I have no doubt that it is a sewer within the meaning of the Act.

Then, being a sewer, does it vest in the local authority? That brings me to s. 13 of the Act, which vests all existing and future sewers within the district of a local authority in that local authority, but makes exceptions, one of which is of "sewers made by any person for his own profit." It has been held by a sequence of authorities that house drains for carrying off house sewage are not sewers made for a man's own profit. But we are not dealing here with a house drain. The sough is not within what primâ facie one would think was the intention of Part III. of the Act, which is headed "Sanitary Provisions." It has been said that if a house drain were to come within the exception, it would eat away the rule, and nothing would ever vest in the local authority. The question here, however, is whether this sough, made, as the county court judge has found, for more economically and conveniently working the quarry and so that the land might be worked more profitably, is made for the profit of the owner. On this point I will refer to the judgment of my brother Romer in *Minehead Local Board* v. *Luttrell*. (1) That learned judge went through the prior authorities, and pointed out that they were cases in which the drains in question were house drains for taking fæcal matter from the house to the sewer, in which it had been held that they were not made for the owner's own profit within the exception in s. 13. He pointed out that in the case before him the defendant had laid out money in making sewers, intending to be compensated directly for his expenditure by payments from persons who availed themselves of the benefit of the sewers. He differentiated the two cases, and held that "profit" was not confined to making profit out of the effluent of the sewer, but covered the case before him. In the later case of *Croysdale* v. *Sunbury-on-Thames Urban Council* (2), Stirling J. held that the word "profit" in s. 13 was not to be restricted to a direct money payment, and that a sewer not made for ordinary drainage purposes, but to enable the land on which it is made to be occupied more profitably, or to avoid an expenditure which

(1) [1894] 2 Ch. 178. (2) [1898] 2 Ch. 515.

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would otherwise have to be incurred in order that the occupation might be more beneficial, is made for the profit of the owner within the meaning of the section, and does not vest in the local authority. The learned judge, after considering *Ferrand* v. *Hallas Land and Building Co.* (1) and *Minehead Local Board* v. *Luttrell* (2), said: "When the object of making the sewer is not either for sanitary or ordinary drainage purposes" —and by that the learned judge meant ordinary sewage drainage purposes—"but to enable the land to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier." This present case comes exactly within that statement of my brother Stirling. On the facts of this case, and on the authorities I have mentioned, I am of opinion that this sough was made for the profit of the persons who made it, and therefore did not vest in the local authority. The judgment of the Queen's Bench Division must be reversed, and that of the county court judge restored.

COLLINS L.J. I am of the same opinion. I think this sough comes within the first exception of s. 13 of the Public Health Act, 1875, as being made by a person for his own profit. The finding with respect to it is: "This drain or sewer was constructed for the more economically and conveniently working the quarry, and so that the land might be worked more profitably." That is arrived at by shewing that the expense of working the stone in the quarry was greatly enhanced by the fact of its being made wet. Hence the necessity which prompted the taking of steps to divert the water by the sough, and hence the damage which is claimed by reason of the incursion of the water into the sough, which water filters through and wets the stone in the quarry. So that it is a sough made for the purpose of removing a mischief in the quarry which rendered its working more expensive, and thereby it is a sough made for the purpose of securing a profit and enhancing the value of the quarry and diminishing the

(1) [1893] 2 Q. B. 135. (2) [1894] 2 Ch. 178.

expense of working it. One looks to see whether there is anything in the Act which sweeps into, or does not except out of its ambit, a sough made under such conditions, and I look first of all for guidance to the definition of "drain." "Drain" is defined in such a way as to shew that it is a drain in the ordinary sense—a house drain—a drain for conveying fæcal matter to a cesspool. Then a sewer is defined by saying that it includes sewers and drains of every description, except drains as defined in the definition just above given, and it excepts drains "vested in or under the control of any authority having management of roads." Thus everything that could be described as a drain, except those two cases, is swept into the ambit of the Act. Although the Act is obviously, in this part of it, a sanitary Act, and the provisions as to sewers and drains are described as sanitary provisions, the framers of it do not appear to have proceeded by the method of excluding from their definition everything that can be described as a sewer or drain which was not intended for sanitary purposes. They have not done that, but they arrive at the same result by other means. They first of all introduce everything that could be described as a drain, and then they make a certain number of exceptions.

Clause 13 deals with the vesting of sewers, and provides that all sewers shall vest in the local authority with certain exceptions, and this is the machinery by which certain defined classes of sewers are excluded from the sanitary provisions of the Act. The exceptions are: "Except (1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders; and (2.) Sewers made and used for the purpose of draining, preserving or improving land under any local or private Act of Parliament, or for the purpose of irrigating land; and (3.) Sewers under the authority of any commissioners of sewers appointed by the Crown." These exceptions shew that there has been swept into the ambit of the Act a great many things which it is not possible to describe as sanitary drains, as, for instance, agricultural drains. If so, the question arises, how are ordinary agricultural drains, which are not made for the purpose of improving the land under a local or private Act of

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Parliament, or for the purpose of irrigating land, to be got out of the Act? It seems to me that if they are got out of the Act—and I think it would be contrary to common sense to hold that they were intended ultimately to be kept within it—the only way in which this can be done is under the first exception: "Sewers made by any person for his own profit." In the case of the particular sough that we are dealing with it certainly was made for the profit of the owner, the only objection being that it was said that it was an indirect profit, and it was said that the same observation as to profit would apply equally to the benefit to land brought about by getting rid of fæcal matter in the ordinary sense. It is said that they are each equally indirect, and that "profit," to take the case out of the general ambit of the Act, must be direct and not indirect. Now, it seems to me there is a fallacy in that contention. No advantage can be got out of any sewer or drain or sough that is not, in a sense, indirect—that is to say, the making of the drain is the means by which the profit is obtained.

It seems to me that there may be a very fair distinction taken, which will make the Act intelligible, and that where the instrument used, being a drain, is primarily used for the main purposes of the Act, sanitation and getting rid of fæcal matter, that is within the Act, although, indirectly, it also brings about a benefit, which might be described as profit, to the person who uses it. But where a drain is made for the purpose of improving the land of the person who makes it—where that is the ordinary purpose of it—then I think that may be described as the direct object of making the drain, and not as a secondary incidental result. I think that there may be a broad distinction between drains made for sanitary purposes and drains made for the mere beneficial occupation of land, and, if that qualification is read into the exception here, I think it may make the whole Act intelligible, and enable us to take out of the Act what otherwise, I think, would be in it, namely, that large class of drains which are made with no sort of reference to sanitary purposes, but are made by the owner of the land for the better enjoyment of his own land. Now, what difference does it make, if one has got so far, whether the profit is

obtained in actual money, by selling the right to use the drain, or by selling that which is got out of the drain? It seems to me there is no difference in principle, but only a different way of getting at the profit. In fact, I do not think there is a better illustration of what I mean by the direct and the indirect result than the case decided by my brother Romer—*Minehead Local Board* v. *Luttrell*. (1) There the drains were made by the owner for the purpose of dealing with fæcal matter merely as a part of the machinery whereby he secured a profit for himself; though one of the steps in the chain of consecution was that fæcal matter should be dealt with, the primary object with which the thing was made was the profit to be earned by selling the right to use it. That was the direct object. In any dealing with sanitary drainage in the ordinary sense, and where the object is to get rid of fæcal matter in accordance with the provisions of the Act of Parliament, that is regarded, from the sanitary standpoint of view of the Legislature, as the object. Where an instrument is being used which may involve two or three processes for the direct purpose of securing so much money, or what is equivalent, so much enhancement of the value of land, that is the direct object in such a case, just as much as the getting rid of sewage is the direct object in the other case. Therefore, it seems to me that this sough comes within the exception, and that the Court below were wrong.

I have the less misgiving in coming to that decision because it is quite obvious that if this matter had been res integra the Court would have decided as I am doing now. They decided it because they felt constrained by the cases. Darling J. cites some words from my brother A. L. Smith in *Ferrand* v. *Hallas Land and Building Co.* (2) The words are these: "It is however not necessary to speculate what would or would not be a 'sewer made by a person for his own profit,' for I am clearly of opinion that a sewer made merely for the purpose of draining premises and for no other purpose (as in the present case) is not 'a sewer made for profit' within the meaning of the exception; first, because it does not come within the ordinary meaning of the terms used; and, secondly, because,

(1) [1894] 2 Ch. 178. (2) [1893] 2 Q. B. 135.

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as was pointed out by Kay J. in *Acton Local Board* v. *Batten* (1) and by Fry L.J. in *Bonella* v. *Twickenham Local Board* (2), if it did, 'the exception would almost eat up the rule.'" With great deference to the learned judge in the Court below, it seems to me that he has done what is so often done in arguments based on dicta—he has treated an illustration as a definition. What the Lord Justice was dealing with is obviously sanitary drainage in the strict sense of the term, because the drainage which was there in question was drainage in the ordinary sense of getting rid of fæcal matter from houses. He had just previously said: "It is however not necessary to speculate"; and he had given instances of what he thought would be the use of a sewer or drain for profit where persons collect the water and sell it, which is not uncommonly done in Lancashire; but this expression of opinion is applicable only to the case before him, and he is dealing with ordinary sanitary drainage. Therefore that constitutes no authority that a sough, made as the one here is made for the purpose for which this is made, is not made for profit. The same remark is applicable to what is said in my brother Romer's decision in *Minehead Local Board* v. *Luttrell* (3), which is treated also as though it were a decision that a profitable return other than moneys would not be profit within the meaning of the Act. I think the learned judge misread these authorities, and conceived them as going much further than they really do, and as binding upon him. He says: "It seems to me a direct benefit may be described as a profit but an indirect benefit cannot." I have already pointed out why I think that the benefit here is a direct benefit, quite as much as the benefit which my brother Romer decided to be a profit in the case before him. The learned judge deals also with Stirling J.'s judgment in *Croysdale* v. *Sunbury-on-Thames Urban Council* (4), pointing out that there also the benefit was direct. The benefit there was, in my judgment, precisely covered by the same principle as the benefit here. The maker of the drain contemplated using the water so as to be an advantage to him after he had brought it to the

(1) 28 Ch. D. 283.
(2) 20 Q. B. D. 63, at p. 65.
(3) [1894] 2 Ch. 178.
(4) [1898] 2 Ch. 515.

place where the drain was to bring it, and he gets the profit of it just as much whether his cattle drink it, or whether he has the advantage of it by the improvement and a general appreciation of the value of the land.

Channell J., for whose opinion in a matter of this kind I have the most profound respect, really gives his judgment on the same lines as Darling J., and feels himself constrained by authorities, none of which has decided that this would not be a profit. There are descriptions of some things which would be a profit which may cover a great many more things than those which may be there expressed; but there is no decision which lays down in anything like plain terms that the present case would not be the making of a sewer for profit. For these reasons I am of the opinion that the appeal must be allowed.

ROMER L.J. If the judgment of the Divisional Court had stood, it would have led to most extraordinary consequences. It would have followed that what I may call purely agricultural drains, drains made by a landowner solely for the purpose of draining his land or removing from it superfluous water, would be sewers within the definition of the Public Health Act, 1875, with all the consequences flowing therefrom. Amongst those consequences would be this—that all the agricultural drains I have referred to would vest in the local authority and have to be repaired by them. Such a result could not, in my opinion, have been contemplated by the Legislature. I am glad to say that when I look at the definition of "sewer" in s. 13 it appears to me that the Court is not bound to arrive at any such result. The reason, to my mind, why agricultural drains of the class I have described do not fall within the operation of the Public Health Act, 1875, is because they fall within the first exception, because they are sewers made by a person for his own profit, "profit" there meaning this, that they are made for the more profitable use of the land, that being the main, if not the sole, object for which the drains are made.

If agricultural drains are not within the operation of this

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Act — and it is clear to my mind that they are not — it is equally clear that the sough or drain made by the quarry owner, in the case before us, is not within the operation of the Act. The sough was made by the quarry owner solely for the purpose of enabling him to work his quarry more profitably, to prevent superfluous water draining into that quarry, and to remove useless water. If anything, it is rather a stronger case than the purely agricultural drain I have previously referred to. But the two cases of drains would stand or fall together. Clearly, to my mind, such a sough or drain as this was a drain made by the quarry owner for his own profit in the sense in which that word is used in s. 13.

It is said—and that appears to have been the ground of the decision by the Divisional Court—that our decision here would lead to the exception from the definition of "sewer" in s. 13 of all sewage drains made for more than one house, which are clearly intended to come within the operation of the Act. In my opinion that is not so. Sewage drains are constructed for sanitary purposes. That is their primary and real object. They are not constructed for profit primarily, or within the reasonable meaning of the word "profit" as used in s. 13. There are many reasons obviously why a local board should have control over such sewage drains, and should not have control over ordinary agricultural drains or such a quarry drain as we have in this case. There is a great difference between sanitary drains and drains made by private persons for the purpose of more profitably using and enjoying their land. It is to the interest of all persons in a district that sanitation should be properly looked after, that the health of the district should be primarily regarded; and there is obviously a good reason why all sanitary drains should be vested in, or be controlled by, the local authority. It is to the interests of all the locality that sanitary drains should be dealt with in a special manner, whereas drains made by landowners for the purpose of improving their land and enabling the land to be more profitably enjoyed are of direct interest only to the landowner, and are matters with which the district is not concerned.

It was suggested that there was a difficulty in our way of regarding this Act by reason of the wording of sub-s. 2 of s. 13 with regard to the provision excepting "sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament"; but, to my mind, that provision was inserted in sub-s. 2, because where the sewers are made under a local or a private Act, it might have been a matter of doubt whether they could be said to have been made by landowners for their own profit in any sense whatever. There might have been a doubt, and for that reason they are especially mentioned. Why, in my opinion, agricultural drains, and such drains as we have in this case, are not especially referred to is because, in the contemplation of the Legislature, they fall within the first exception of sub-s. 1. I think myself that the definition of Stirling J. in the case of *Croysdale* v. *Sunbury-on-Thames Urban Council* (1) is correct, subject to this, that I think one should omit the words used by him: "or ordinary drainage purposes." Omitting that, the proposition as put by him appears to be perfectly sound, and would run, with the alteration I have suggested, as follows: When the object of making the sewer is not for sanitary purposes, but is to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, the sewer is made for the profit of the occupier within the meaning of s. 13, sub-s. 1.

Lastly, I would add this. In the present case it was suggested that this sough ought not to be held excepted from the operation of the Act because it has been made by the quarry owner to drain into a public sewer. In the first place, if the sough were really made by the quarry owner for his own profit, it could not cease to have been made for his own profit because it drained into a public sewer. It may have been that the quarry owner had no authority to connect this private drain with the sewer. So far as appears, the public sewer was not a sewer which belonged to the local authority which is a party to this action, and certainly that was a point the consideration

(1) [1898] 2 Ch. 515.

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of which did not arise in this case. If the facts were investigated, it might turn out that this particular sough was allowed to drain into the sewer of another district authority under some special arrangement. I quite follow that possibly there might have been a difficulty in the way of the plaintiffs here, if it had turned out that they had drained into a sewer of the local authority, and could only have done that by acknowledging that this sough was a sewer within the operation of the Act. That might have been a case made against them; but such a case does not arise here, and need not therefore be further considered.

Appeal allowed.

Solicitors for plaintiffs: *Bower, Cotton & Bower, for Longbottom & Sons, Halifax.*

Solicitors for defendants: *Helliwell, Harby & Co., for Jubb, Booth & Helliwell, Halifax.*

A. M.

1900 *Jan.* 29.

FELTON AND ANOTHER *v.* BOWER & CO.

City of London Court—Jurisdiction—Cause of Action arising in City of London—Leave to Issue Process—London (City) Small Debts Extension Act, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39 (*Local*)—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.

Process in an action in the City of London Court may be issued without leave of the judge or registrar where the defendant does not dwell or carry on business in the City of London, but the cause of action arose wholly or in part therein. In this respect s. 74 of the County Courts Act, 1888, does not repeal s. 39 of the London (City) Small Debts Extension Act, 1852.

APPEAL from a decision of Lawrance J. at chambers.

The plaintiffs brought an action in the City of London Court to recover 26*s.*, the balance of the price of goods sold and delivered to the defendants. Upon the entry of the plaint a default summons was issued under s. 86 of the County Courts Act, 1888 (51 & 52 Vict. c. 43). The leave of the judge or registrar was not obtained to the issue of the summons. It was

duly served upon the defendants, and they filled up the form at the foot of it, giving notice of their intention to appear and defend the action, and object to the jurisdiction. They appeared accordingly, and objected to the jurisdiction on the ground (inter alia) that they did not, nor did either of them, when the action was commenced, dwell or carry on business within the district of the City of London Court, and no leave of the judge or registrar to issue the summons had been obtained. It appeared that the defendants dwelt and carried on business in Liverpool, and that the order for the goods was given by them in Billiter Street, in the City of London, which was the place of payment. The registrar overruled the objection to the jurisdiction, and, the defendants' solicitor declining to contest the case on the merits, judgment was entered for the plaintiffs for the amount claimed and costs.

The defendants thereupon obtained from Lawrance J. at chambers an order for a writ of prohibition, directed to the judge of the City of London Court and the plaintiffs, prohibiting them from further proceeding in the matter of the action.

The plaintiffs appealed from this order.

Danckwerts, Q.C. (*H. Nield* with him), for the appellants. Sect. 74 of the County Courts Act, 1888, does not deprive the City of London Court of its jurisdiction, under s. 39 of the London (City) Small Debts Extension Act. 1852 (1), to issue

(1) The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii., s. 39), provides that a summons upon plaint "may issue provided the defendant or one of the defendants shall dwell or carry on business or have employment within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business or shall have had employment therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein."

The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants, dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave in the court in the

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process without any leave where the cause of action arose either wholly or in part within the City of London or its liberties. The provisions of a special Act are not overruled by subsequent general legislation unless the words of the general Act are clearly repugnant. The decision in *Kutner* v. *Phillips* (1) is in point and binds this Court. The question there was whether the provision in s. 39 of the Act of 1852, enabling a summons upon plaint to be issued if the defendant had been employed within the City, was not taken away by s. 74 of the County Courts Act, 1888. The Court held that it was not, because the second Act did not impliedly repeal the provisions of the first. The exact point now before this Court was decided, in favour of the plaintiff, in *Reg.* v. *Registrar of Croydon County Court* (2) by a Divisional Court (Mathew and Charles JJ.). The order for a prohibition ought, therefore, to be discharged.

Bonsey, for the respondents. Sect. 74 of the County Courts Act, 1888, applied to the issue of this summons by the City of London Court, and leave to issue it was therefore necessary.

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district of which the cause of action or claim wholly or in part arose."

Sect. 185: "The courts held by virtue of the London (City) Small Debts Extension Act, 1852, shall be held by the name of the City of London Court and shall be a court of record, and its decisions shall be subject to appeal in the same way and on the same conditions as the decisions of a county court are subject for the time being. The judge and officers of the City of London Court shall respectively have and exercise the like jurisdiction, power, and authority in all respects, except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a county court. The rules and orders in force for the time being for regulating the practice of and costs in the county courts, and forms of proceedings therein, shall be in force in the said City of London Court, to the exclusion of any other rules and orders; and the same fees shall be taken for proceedings in which jurisdiction is hereby given to the court as upon similar proceedings in the county courts, and such fees shall be applied in the same manner as the fees taken under the provisions of the said London (City) Small Debts Extension Act, 1852; provided that nothing in this Act shall take away, lessen, or diminish any of the powers, rights, or privileges, of the judge of the said court, or the authority of the mayor, aldermen, and commons of the City of London in common council assembled in relation to such court, or to the judge or officers thereof, or to the fees taken therein, as such powers or authority heretofore existed."

(1) [1891] 2 Q. B. 267.

(2) (1894) 11 Times Law Rep. 19.

Sect. 185 provides that the City of London Court shall have the same jurisdiction as the county courts, and be subject to the same rules and orders with respect to practice and procedure to the exclusion of any other rules and orders. The object was to make the City of London Court, as far as possible, a county court. The decision in *Kutner* v. *Phillips* (1) is not in point, because s. 74 does not deal with the case of a defendant employed in the City, and there is, therefore, in that respect no inconsistency between the section and s. 39 of the Act of 1852. Sect. 74, however, does expressly deal with the case where the cause of action has arisen wholly or in part within the City, and provides that, in that event, an action may be commenced, but only with the leave of the judge or registrar. That provision is repugnant to, and has the effect of repealing, the provision of s. 39 of the Act of 1852, which allows a summons to issue where the cause of action arose wholly or in part within the City, and does not require any leave to be given. The decision in *Reg.* v. *Registrar of Croydon County Court* (2) is not binding on this Court. It was not necessary to decide this point because there was another obvious ground upon which the judgment of the Court could be supported. [He also referred to *Blades* v. *Lawrence.* (3)]

Danckwerts, Q.C., in reply. The jurisdiction is given affirmatively in both the Acts in question. There is no repugnancy between the provisions of s. 74 of the County Courts Act and s. 39 of the Act of 1852 in respect to cases where the cause of action arose wholly or in part within the City. The County Courts Act, 1888, s. 185, only meant to give the City of London Court the ordinary powers of a county court. If leave were necessary where the defendant neither dwelt or carried on business within the City, the judge of the City of London Court by giving or withholding leave could affect the fees taken in that court, and interfere with the power and authority of the council in relation thereto. The proviso at the end of s. 185 of the County Courts Act, 1888, expressly provides that the Act shall have no such effect. (4)

(1) [1891] 2 Q. B. 267.
(2) 11 Times Law Rep. 19.
(3) (1874) L. R. 9 Q. B. 374.
(4) Other points were taken by

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CHANNELL J. I think, on the whole, that this appeal must be allowed. There is only one point which has given me difficulty, and my doubts upon it are not altogether removed. It is the main and substantial question in the case, and it is this: Where the defendant resides and carries on business outside the jurisdiction of the City of London Court, and is not and never has been employed within the City, but where the cause of action has arisen either wholly or in part within the City, is it or is it not necessary that leave should be given to issue the summons? It was insisted by counsel for the plaintiffs that *Kutner* v. *Phillips* (1) is an authority binding upon us in respect of that question. I am quite clear it is not. Some of the reasons which are given in the judgments in that case are, it is true, applicable to the point before us, but the greater part of them are not. The main question argued in *Kutner* v. *Phillips* (1) was whether certain provisions in s. 39 of the special Act of the City of London Court and in s. 74 of the County Courts Act, 1888, were consistent or inconsistent with each other, and—with reference to the case then before the Court of a person who had been employed within the City although he did not reside or carry on business there—nothing could be clearer than that the two Acts were not inconsistent. The first Act gave jurisdiction where the defendant had employment in the City; the second Act said nothing whatsoever about employment: it simply gave jurisdiction to the county courts in certain cases and under certain conditions, and the case of employment within the district was not one of them. So far as I can see, there was no pretence for holding that the two Acts were in any way inconsistent. That decision, turning as it might turn upon that conclusive point, is therefore not binding upon us where, as here, the question is wholly different. In the case now before us it is clear, I think, that

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counsel for the respondents, who, in support of the order for a prohibition, relied on alleged irregularities of procedure in the City of London Court. As, however, the Court were of opinion that it was not clear upon the affidavits that those irregularities had occurred, it is thought unnecessary to include the facts, arguments and judgment with respect to them in this report.

(1) [1891] 2 Q. B. 267.

the provisions are inconsistent. The provision in s. 39 of the first Act is that the City of London Court shall have jurisdiction if the defendant resides or carries on business outside the jurisdiction, provided that the cause of action arose wholly or in part within the City. That jurisdiction is given by the Act quite clearly and without any qualification. Then comes the second Act which, by s. 74, gives the same jurisdiction; but gives it, as I think, distinctly with a qualification; and, in my view, the Act which gives the jurisdiction with a qualification is inconsistent with the Act which gives it without. The second Act gives the jurisdiction, as was said in argument, affirmatively; but nevertheless there is a distinct negative implied when it says "or with the like leave in the court in the district of which the cause of action or claim wholly or in part arose." To say that you may do a thing with the leave of the Court is the same as if you added "but not without that leave," and if those words were there, the second Act would certainly be inconsistent with the first. I therefore think that the decision in *Kutner* v. *Phillips* (1) does not bind us. But that case has a bearing upon the present one, because it was pointed out that the Act of 1852 was an Act dealing specially with the City of London Court, and that the County Courts Act, 1888, is general and not special legislation, and the rule is that general does not overrule special legislation unless it can be seen quite clearly that it was intended so to do. If s. 74 of the general Act had said that the provisions of that section were to apply to all county courts, including the City of London Court, then s. 74 as a whole would have been inconsistent with s. 39 of the Act of 1852, and we should have been bound to say that the City of London Court could not issue process in these cases without leave being given. But the words "including the City of London Court" are not there. Sect. 74 is general legislation intended to apply to county courts generally, and there is nothing to shew that it was intended that the City of London Court, which could issue the process without leave then, should in future only issue it with leave. Upon these grounds I think we ought to decide that

(1) [1891] 2 Q. B. 267.

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the City of London Court can still issue the process without leave.

As to *Reg.* v. *Registrar of Croydon County Court* (1), that case is not reported in the regular reports; but we have had before us a shorthandwriter's note of the proceedings. Looking at that, I have doubts whether the case is a satisfactory authority. Apparently the learned judges did intend to decide the point before us now; but there was another obvious ground for discharging the rule, and I question whether their decision of a point which it was really unnecessary to decide is absolutely binding upon us. This is not very important, because we have arrived at the same conclusion as they did; but if I had come to the opposite conclusion, I doubt whether I should have felt bound to follow them. It is clear that both of them thought that *Kutner* v. *Phillips* (2) applied, and, for the reasons I have given, I am clear that it did not.

I am of opinion that the appeal should be allowed, and the order for a writ of prohibition discharged.

BUCKNILL J. I should like to add that, though I agree with what my brother has said, one cannot read *Kutner* v. *Phillips* (2) and *Reg.* v. *Registrar of Croydon County Court* (1) without coming to the conclusion that the learned judges who decided those cases appear to have formed a strong opinion that the jurisdiction of the City of London Court stands unimpaired by the County Courts Act, 1888, and unaffected except so far as equitable jurisdiction is added. I am of the same opinion. I think it was intended not to interfere with the jurisdiction of the City of London Court; it was intended to make a different set of rules apply to its procedure and practice, but to allow the jurisdiction to remain unchanged.

Appeal allowed.

Solicitor for appellants: *The City Solicitor.*
Solicitors for respondents: *Prebble & Hall.*

(1) 11 Times Law Rep. 19. (2) [1891] 2 Q. B. 267.

W. A.

THE QUEEN *v.* LAW.

1900
Feb. 14.

Criminal Law—Costs—Prosecution for Corrupt Practices at Municipal Election —Private Prosecutor—Defendant's Right to Costs where acquitted—Corrupt Practices Prevention Act, 1854 (17 & 18 *Vict. c.* 102), *s.* 12—*Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 53—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 30.

Where a private prosecutor prefers an indictment charging the commission of a corrupt practice at a municipal election, the defendant, if acquitted of the charge, is entitled to recover from the prosecutor the costs sustained by reason of the indictment.

FURTHER CONSIDERATION before Bucknill J.

At the Cardiff autumn assizes of 1899 Edmund Law was tried before the learned judge and a jury on an indictment charging him, under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), with the offence of "treating" at a municipal election.

The prosecution was instituted by a private prosecutor, and at the close of the case for the prosecution Bucknill J. directed a verdict of acquittal. The defendant's counsel then applied for an order for the defendant's costs. The learned judge declined, if it was matter for his discretion only, to make the order, but he reserved for further consideration the question whether the defendant was entitled as of right to recover his costs from the prosecutor.

B. F. Williams, Q.C., and *Ivor Bowen* (*Bowen Davis* with them), for the defendant. The defendant is entitled to his costs. Sect. 30 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, provides that the prosecution of a corrupt or illegal practice committed in reference to a municipal election, and all proceedings in relation thereto, shall be the same as if the offence had been committed in reference to a parliamentary election, and s. 53 (with other sections) of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), which applies to parliamentary elections, shall apply accordingly, as if it was re-enacted in the Act of 1884. Sect. 53 of the Act

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of 1883 provides that s. 12 (with other sections) of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act. Sect. 12 of the Act of 1854, which also applies to parliamentary elections, enacts that in case of any indictment by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he "shall be entitled to recover from the prosecutor the costs sustained by reason of such indictment." Sect. 12, therefore, clearly entitles the defendant to his costs.

S. T. Evans, for the prosecution. Sect. 30 of the Act of 1884 does not incorporate s. 12 of the Act of 1854. It deals only with procedure, and applies the procedure under the Act of 1883 with respect to parliamentary elections to municipal elections. Sect. 53 of the Act of 1883 only brings in the procedure of the Act of 1854 with respect to prosecutions for offences under the Act of 1883 committed at parliamentary elections. If this had been a parliamentary election, the defendant no doubt would be entitled to his costs; but s. 30 of the Act of 1884 was not intended to apply the provisions of s. 12 of the Act of 1854 with respect to costs to municipal elections. The defendant, therefore, is not entitled to costs.

Cur. adv. vult.

Feb. 14. BUCKNILL J. read the following judgment:—The question I have to decide is, whether in this prosecution of Edmund Law, which was tried before me at the last assizes holden at Cardiff, the defendant, who was acquitted, is entitled to recover from the prosecutor his costs sustained by him by reason of such indictment.

The indictment was preferred by a private prosecutor, under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for treating at a municipal election, and after the case for the prosecution was closed I directed the jury to find a verdict of acquittal. Application was then made to me by the learned counsel for the defendant that I should make an order giving him his costs; but, for reasons for which I need not

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now repeat, I declined to exercise such a discretion if it was open to me to do so; but I reserved the question whether the defendant was entitled to his costs for further consideration, as there was no opportunity at the time to consider the statutes relating to the subject.

The matter has now been argued before me, and my attention has been drawn to those Acts of Parliament which govern the question. They are three in number. I will first refer to the latest of them. It is the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. By s. 30 it is enacted: "Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice or any illegal payment, employment, or hiring committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of public prosecutions in relation to any such offence, and all other proceedings in relation thereto . . . . shall be the same as if such offence had been committed in reference to a parliamentary election; and ss. 45 and 46, and ss. 50 to 57 (both inclusive), and ss. 59 and 60 of the Corrupt and Illegal Practices Prevention Act, 1883, shall apply accordingly as if they were re-enacted in this Act. . . . ." Now one of these sections so applied to that Act is s. 53, and that section is in the following terms: (1.) "Sects. 10, 12, and 13 of the Corrupt Practices Prevention Act, 1854, and s. 6 of the Corrupt Practices Prevention Act, 1863 (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said s. 10 may be made on the defendant; but the Director of public prosecutions or any person instituting any prosecution in his behalf or by direction of an election court shall not be deemed to be a private prosecutor, nor required under the said sections to give any security."

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It is, therefore, clear that s. 12 of the Corrupt Practices Prevention Act, 1854, is to be read into the Act of 1884, and that its provisions extend to any private prosecution on indictment for the offence of any corrupt practice within the meaning of that—the 1884—Act. Sect. 12 is as follows: "In case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given." Now, going back to s. 30 of the Act of 1884, we see by reference to the Acts of 1883 and 1854 that s. 12 of the Act of 1854 applies to the procedure for prosecutions under the Act of 1884, and all other proceedings in relation thereto, with the necessary modifications.

It was argued by the learned counsel for the prosecution that s. 30 of the Act of 1884 applied only to the procedure for the prosecution of a corrupt or illegal practice, and not to a question of costs; but that cannot be so for two reasons, the first of which is that the section provides that the incorporated sections of the Act of 1883 apply, not only to the procedure for the prosecution in such cases, but to all other proceedings in relation thereto; and the second reason is that s. 12 of the Act of 1854 deals only with costs, and the right of a defendant who has had judgment given in his favour to recover them from the private prosecutor. That section deals with nothing else.

It is, therefore, clear to me that the defendant in this prosecution is entitled to recover from the private prosecutor the costs sustained by him by reason of the indictment which was preferred against him, such costs to be taxed by the proper officer of the court in which the judgment of acquittal was given.

Judgment accordingly.

Solicitors for defendant: *Viner, Leeder & Morris, Swansea.*
Solicitor for prosecutor: *T. J. Hughes, Bridgend.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1900
Jan. 20.

HADDOCK *v.* HUMPHREY.

Employer and Workman—Compensation—Employment on, in, or about a Factory — Wharf — Timber-Yard — Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

For the purpose of unloading timber from timber-ships a dock board provided quay or wharf space running inland for 150 yards from the water's edge; at the further end of this space was a fence with gates at intervals, behind which came a series of yards leased by the dock board to different timber merchants for storing their timber, the whole being the property of the dock board, and separated by a wall from the surrounding property. A workman employed by a firm of carters was killed while moving a log of timber in one of the yards leased to a firm of timber merchants :—

Held, by A. L. Smith L.J. and Collins L.J. (Rigby L.J. dissenting), that the word "wharf" as used in s. 23 of the Factory and Workshop Act, 1895, and s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, must be construed in its ordinary and popular signification of a place contiguous to water over which goods pass in the process of loading and unloading, that the yard where the accident happened was not a wharf within the meaning of those sections, and that the employment of the deceased was therefore not one to which the Workmen's Compensation Act, 1897, applied.

APPEAL from a decision of the judge of the Liverpool County Court upon an application for compensation under the Workmen's Compensation Act, 1897, made by the appellant, the widow of a man who was killed by an accident in the course of his employment by the respondents.

The respondents were a firm of carters, who had been employed by a builder to fetch for him a particular log of timber which was lying in a yard adjacent to the Canada Dock at Bootle, the yard being in the occupation of a firm of Parker & Co. The deceased, who was in the employment of the respondents, had been sent by them with a cart to fetch away the log, which was one of the lower logs in a pile of timber in the yard. While the upper logs were being removed out of the way by a travelling crane one of them slipped, and, falling

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against the deceased, caused fatal injuries. It was contended on the part of the applicant that the place where the accident happened was a wharf within the meaning of the Workmen's Compensation Act, 1897, as enlarged by the Factory and Workshop Act, 1895, and that the respondents were therefore liable to pay compensation under the former Act, while the respondents contended that it was merely a private timber-yard, and that they were exempt from liability. The facts upon which the question arose were in substance as follows: Alongside the water was a large space which was used as a timber quay for the unloading of ships laden with timber, which space stretched inland from the water about 150 yards. At the extreme end of this space was a roadway which ran parallel with the water, and was used, when the dock premises were open, by any member of the public who required to make use of it. On the further side of the roadway was a fence, with offices built at intervals and projecting in front of the fence; behind the fence and offices was a row of yards, the entrance to each of which was by a gate at the side of the office. The whole of the yards were, so far as the ownership of the soil was concerned, the property of the dock board, and they were all inclosed, together with the quay space, by a wall and gates belonging to the dock board. The yards and offices attached to them were leased by the dock board to various parties importing their timber at the dock, the particular yard where the accident happened being leased to Messrs. Parker & Co. and used by them as a timber-yard for the storage of the timber. The yards were bounded on the side farthest away from the water by a public highway called Regent's Road, beyond which was another series of timber-yards, not, however, the property of the dock board. The learned county court judge was of opinion that the locus in quo was not a wharf within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and s. 23 of the Factory and Workshop Act, 1895 (1), and that the applicant was not entitled to compensation. The applicant appealed.

(1) By s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), "'Factory' has the same meaning as in the

Blackwood Wright, for the appellant. The place where the accident happened was a wharf within the meaning of s. 23 of the Factory and Workshop Act, 1895, and the applicant is entitled to compensation under the Workmen's Compensation Act, 1897. It is part of the dock premises, and not a separate timber-yard. It is within the definition of "wharf" in s. 492 of the Merchant Shipping Act, 1894, where that word includes "all wharves, quays, docks, and premises in or upon which any goods, when landed from ships, may be lawfully placed." The word itself comes from a Danish word signifying "something thrown back," and among the meanings given to it in the Century Dictionary is "a yard." A wharf is not the same as a quay, for goods may lie on a wharf, but not on a quay; a wharf includes a space for storing as well as discharging cargo. If this place was a wharf, it was occupied by the respondents within the meaning of s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, and they were therefore "undertakers" within the meaning of the Workmen's Compensation Act, 1897. [He cited *Hall* v. *Snowden, Hubbard & Co.* (1)]

Joseph Walton, Q.C., and *Leslie F. Scott*, for the respondents. The question is really one of fact, and there was ample evidence to justify the finding of the county court judge that the place was a timber-yard and not a wharf. It is possible that a wharf may be used for purposes of storage, but an uncovered store is not necessarily a wharf. The word "wharf" is used in these Acts in its ordinary sense of a space alongside the water convenient for the discharging of cargo from ships. Further, it comes between the two words "dock" and "quay," a collocation which suggests a necessary connection with water. The dictionaries all treat the word as ordinarily meaning a bank

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Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . ."

By s. 23, sub-s. 1, of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), certain provisions of the Factory Acts are to have effect "as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory."

(1) [1899] 2 Q. B. 136.

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alongside a stream which is used for discharging cargo. This particular yard was as much a timber-yard as the yards on the further side of the Regent's Road, and the question is not affected by the fact that the yards on one side of that road are the property of the dock company and those on the other side are not; the mere fact that the yard is within the walls which bound the dock property cannot make it a wharf.

Blackwood Wright, in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed, and that the learned county court judge was right in holding that the place where this accident happened was not a wharf within the Workmen's Compensation Act, 1897, as extended by the Factory and Workshop Act, 1895. There is no dispute as to the facts, which in my opinion are all one way; and the real question is whether this place was a wharf or a timber-yard within the meaning of those words. The place in question is at the Canada Dock at Bootle, and it appears that, extending for about 150 yards inland from the water's edge, there is an open cobbled space, which is bounded at the upper side from the water by a roadway. That for that breadth of 150 yards the ground is a wharf or a quay I do not doubt, and if the accident had happened in that space the case would have been within the Workmen's Compensation Act, as the deceased would have received injury by accident upon a wharf or quay; but that is not where the accident happened. It appears that after crossing the roadway there are a number of offices occupied by timber merchants, while at the rear and side of the offices is a fence with gates in it, so that no person could get off the quay (as I may call it) in that direction without going through a gate. The accident happened on the piece of land behind the fence and gates, and it is this piece of land the character of which has been so energetically debated. That piece of land is inclosed on all sides, and at the end furthest from the water is a wall or fence which separates it from a public street called Regent's Road. The particular portion of this land upon which the accident happened is leased by the Mersey Docks and Harbour Board

to Messrs. Parker & Co., a firm of timber merchants, who use one of the offices for the purpose of their business; the timber is unloaded from the ship and then taken across the 150 yards of wharf or quay through the gate at the entrance of Parker & Co.'s land, and is then stored by them as timber merchants and kept until it is wanted for use. The question, therefore, is whether in ordinary language this yard in which timber was stored, surrounded as it was with a wall or fence, was a wharf or a timber-yard. The county court judge found that it was a timber-yard and not a wharf, and it has been strongly urged upon us by the appellant's counsel that, whether it was a timber-yard or not, it was a wharf; I am of opinion, however, that it was not a wharf within the meaning of the Act. The accident happened thus. The respondents used carts or other vehicles for carrying large baulks of timber; the deceased went by their instructions to take a log from Parker & Co.'s store, and while moving it was killed by the fall of the tier of timber in which this log was.

What is the meaning which is to be placed on the word "wharf" in this Act? I have a strong opinion that a wharf must have something to do with water. On looking at s. 23 of the Factory and Workshop Act, 1895, it will be seen that it increases the area of employment beyond that which was included in the earlier Factory Acts: it brings docks, wharves, quays, and warehouses within the purview of the factory legislation for certain purposes, just as s. 22 had brought laundries within it. The section enacts that certain provisions which are to be found in the earlier Factory Acts are to have effect "as if every dock, wharf, quay, or warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory"; I need not go on to that part of the section which deals with the person who is to be deemed the occupier. What is the meaning of the word "wharf" as there used? My view is that, for the purpose of the application of the Factory Acts, the space of 150 yards from the water's edge is included in that word, but not the land lying behind, which is cut off by a fence and gates. If

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this yard comes within the meaning of the terms "wharf" or "quay," I cannot see why the yards on the other side of Regent's Road should not come within the same category; and, if that is so, it is difficult to see where any line can be drawn. For these reasons I think that the appeal should be dismissed.

RIGBY L.J. I regret that I am unable to come to the same conclusion. If the word "wharf" is to be construed etymologically, it has nothing to do with water; it comes from an old Anglo-Saxon word meaning "something thrown up," there being similar words in cognate languages. I agree that, looking at all the meanings of the word, it does appear that it is not generally used except as meaning a place which is somehow in connection with water; and in the present Act it is clearly used in connection with water, for it comes in the same heading as "dock," which for the purposes of the Act must mean a place for shipping to lie in for the purpose of loading or unloading. I think, therefore, that the land on the other side of the Regent's Road, a public highway, could not possibly be held to be a wharf.

What is the state of things which we have here to consider? The Mersey Docks and Harbour Board has provided not only a waterway in the Canada Dock, but also quays and all other conveniences which are useful for the purposes of the timber trade, this dock being mainly a dock for the reception of waterborne timber. In doing its duty to its customers the board provides for them (inter alia) yards, which are included within a fence and are entirely closed on occasions; these yards are provided mainly for the reception of timber from the dock, though that may not be the sole purpose. It has not been in any way shewn that there is any limit to the time during which the timber can be stored in these yards, and such a yard is in my judgment at once a timber-yard and a wharf: it fulfils all the essential requisites of both. If very much less land had been provided by the dock board than was required for the reception of timber, and it had, therefore, been necessary to make a rule that the timber must be removed within a given

number of hours, there can be no question that the land provided would have been a wharf; but no such rule has been made as regards this particular land, for none was necessary. The distinction seems to be between land temporarily used for the reception of timber and land used for permanently stacking it. The dictionaries afford us no assistance in coming to a conclusion. In my judgment this land is land reasonably provided by the dock board for the convenience of timber merchants who deal in timber which is brought to the dock, and whether or not there is a quay space intervening between that land and the water makes no difference. I am, therefore, prepared to hold that the place where the accident happened was a wharf within the meaning of the Act, and that the appeal should be allowed.

COLLINS L.J. I am of opinion that the decision of the learned county court judge was right. The only safe standard of construction that we can apply is to give to the language used in the statute its ordinary popular sense; any attempt to refine away its ordinary meaning is fraught with difficulties which it is not always easy to foresee. Of such difficulties we have already had some experience. One of the words we have had to construe is "dock," as to which we said that it must receive its popular meaning. In my judgment the locus in quo in the present case could not in the popular sense of the word be called a wharf; it is, no doubt, contiguous to an undoubted wharf, but it is specially set apart and leased to a particular firm; it is not a place over which goods pass in transit, but one which is chiefly intended and used for the purpose of storage. No doubt if this yard were roofed over it would be a warehouse; but in its present state it is not in the popular sense of the word a wharf, not being a place contiguous to water over which goods pass in the process of loading and unloading, and which serves as a factor in their transference from the water to the land. There is a large space of ground between the roadway and the ship which does meet that purpose, and as to which it is clear that the dock board might within reasonable bounds limit the time during which goods

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might lie upon it; such a right is essential in dealing with a place over which goods are taken in transit. That space answers to the ordinary conception of a wharf, the primary idea in connection with which is not that of storing goods, but of use as a factor in their loading and unloading. But the place here in question is leased to a firm who use it mainly for storage purposes, and it would be a misnomer to call it a wharf. The wharf is kept by the dock board for the use and convenience of their licensees when loading or unloading goods; this land is occupied by an individual tenant, and the dock board have renounced all rights over it, except such as they may have by virtue of being the lessors; it has, therefore, ceased to be a wharf in the popular sense of the word, even if it is sufficiently contiguous to the water to be capable of being a wharf at all. It has been suggested during the argument that a wharfinger occupying his own wharf may store goods which are landed on his wharf, and I do not say that it is impossible that storage of goods may take place on part of a wharf. But the matter is simplified in the present case; the lessees do not own a wharf and could not be called wharfingers. I think, therefore, that user of such a place for storage does not make it a wharf, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Cuthbert Curtis, for Quilliam, Liverpool.*

Solicitors for respondents: *J. R. Watkins, Liverpool.*

W. J. B.

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Feb. 1, 2.

Common Lodging-house—Liability to Penalty for Keeping—Charitable Institution—Non-registration—Common Lodging Houses Act, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict. c.* 41).

Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging-house unless his name as the keeper thereof be entered in the register kept under" the Common Lodging Houses Act, 1851.

The respondent kept a house for the reception of male lodgers which was not carried on for the sake of making a profit, but solely for the purpose of assisting the poorer classes. The lodgers were charged 6*d.* or 8*d.* a night, and for this each lodger got the use of a common dining-hall and sitting-room and the right to the exclusive occupation of a cubicle which contained a bed, and which was separated from the rest of the dormitory by walls about 6½ feet high made of tiles. A certain number of the lodgers were of a better class than the inhabitants of an ordinary common lodging-house, but substantially the lodgers were of that description. Drunken and disorderly men, and men who were suspected of being criminals or verminous, were not admitted, but all other men were admitted on payment. The house was not registered as a common lodging-house:—

Held, that since the inmates of the house were persons of the poorer class who were likely to be in a dirty and insanitary condition, and since they occupied at least part of the house in common, it was a common lodging-house within the meaning of the Common Lodging Houses Acts, 1851 and 1853, and ought to have been registered.

Case stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

An information was laid by the appellant on behalf of the London County Council against the respondent for that he, on certain days in June, 1899, contrary to the provisions of s. 3 of the Common Lodging Houses Act, 1853, did keep a house known as the Victoria Home, 177, Whitechapel Road, in the parish of St. Mary, Whitechapel, as a common lodging-house, and did receive lodgers therein, which said house had not been inspected and approved in that behalf by the local authority, and had not been registered as provided by the Common Lodging Houses Act, 1851. The magistrate after hearing the evidence dismissed the information, but stated the following

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case on the application of the appellant for the opinion of the Queen's Bench Division.

"1. The house known as the Victoria Home, 177, Whitechapel Road, hereinafter referred to as 'the new block,' is vested in seven trustees, of whom the respondent is one. The said Victoria Home and two other homes are managed for the trustees under their general regulations by Mr. Augustus Wilkes.

"2. The said Victoria Home is, with other property, vested in the said trustees under and by virtue of and subject to the trusts contained in a deed-poll bearing date October 21, 1890, and enrolled in the Central Office of the Supreme Court of Judicature on December 11, 1890. . . .

"3. In or about the year 1890 the committee, which was then maintaining and carrying on under the provisions of the said trust-deed a home in the Commercial Road for persons of the working classes . . . . determined to extend their work among the poorer classes, and for that purpose acquired the site of the old Whitechapel Infirmary, and caused to be built upon the back portion of that site a building hereinafter referred to as 'the old block,' which they equipped and carried on as a home and lodging-house for persons of the poorer classes. The old block, which includes a mission hall, was built before 1891, and on January 29, 1891, was registered under the Common Lodging Houses Act, 1851, as a common lodging-house for the reception of 500 lodgers, and has continued to be so registered down to the present time. The respondent does not, however, admit that such registration could have been enforced by the local authority.

"4. In the year 1897 the trustees, in further extension of their work among the poorer classes, caused a new building, hereinafter referred to as 'the new block,' to be erected on the front portion of the said site, so as to abut upon the Whitechapel Road. The new block contained accommodation for 128 lodgers; that is to say, it contained 128 single-bedded cubicles or bedrooms, and certain common rooms, as hereinafter mentioned. The said new block was not registered as a common lodging-house under the said Act, and the failure to

register the said new block was the offence alleged by the information.

"5. There is a common entrance from the street giving access to both the old and new blocks, and a second entrance from the street giving access to the new block only, which second entrance, however, is not at present in use. There is also internal communication between the new and the old blocks on the ground-floor and the first and second floors. Such internal communication and the said two entrances were provided by the trustees pursuant to and for the purpose of complying with the requirements of the London County Council under the London Building Act, 1894.

"6. The said new block contains in the basement a common dining-hall, which is fitted for use as a kitchen, but is not in fact so used; on the ground-floor a common sitting-room, or recreation room for reading, smoking, &c., and on each of the first, second, third, and fourth floors 32 cubicles in large dormitories. When each cubicle is occupied, an air space is provided of between 350 and 400 cubic feet per man. Each cubicle contains only one bed, and is exclusively occupied by one man, and is about 6 feet 6 inches long and 4 feet 6 inches wide, and the walls of the cubicles (which are made of tiles and painted) are about 6 feet 6 inches high. Each lodger pays 6*d.* or 8*d.* a night, according to the position of the cubicle which he occupies, and each lodger on making such payment is entitled to the use of the common rooms hereinbefore mentioned in the basement and on the ground-floor, in addition to the use of a cubicle. In the common kitchen in the said old block a kitchen fire is provided, with kettles, cooking utensils, teapots, cups, saucers, and plates, which serve mainly for the use of the lodgers in the said old block, but lodgers in the new block can and do go into the kitchen in the old block for the purpose of cooking their food there, and take it when so cooked into the basement of the new block and eat it there, although such use of the kitchen in the old block by the lodgers in the new block is a practice which is not recognised by the trustees. The trustees and those who carry on the said home make it a special object and practice to pay regard to the moral and

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spiritual needs of the inmates by giving lectures and holding classes for them. Efforts are made by the manager to help deserving inmates to find situations and work, and to assist them during and after illness. A certain number of the lodgers are of a better class than the 'dosser' or inhabitant of an ordinary common lodging-house, but substantially the lodgers are of the 'dosser' description. It was not alleged that the said home was overcrowded.

"7. The lodgers in the said new block either bring in their own food ready cooked, or they purchase their food at a hatch or bar provided for the purpose, which is a few feet within the old block of the said premises, or (as mentioned in the preceding paragraph) they bring it in uncooked and cook it in the said common kitchen in the old block. And the said lodgers, whether they eat their food on the said premises or not, generally use one or more of the said common rooms in the basement or on the ground-floor.

"8. The price charged for a night's lodging in a common lodging-house, carried on as a commercial undertaking for the sake of making a profit, varies in different houses and in different parts of London. It is generally 4*d.* or 6*d.*, and in some cases as much as 8*d.* or 1*s.* is charged; in a few cases as little as 3*d.* is charged.

"9. Only men are admitted as lodgers. Men who are drunk and disorderly, or who are suspected of being criminals, or who are verminous, are not admitted. Save as aforesaid, all comers (being men) are admitted upon payment to the said new block. . . .

"10. It was proved that the said new block was carried on by the trustees at a profit (no allowance, however, being made for interest on capital), and that this profit was applied in the first place in paying interest on money borrowed on mortgage of the said home for the purpose of defraying a portion of the cost of erecting the buildings, and in the next place in paying off part of the principal of the money so borrowed. The whole of the profits were thus devoted to the objects specified in the said deed, and not for the personal benefit of the trustees.

"11. A considerable part of the sum required for the said

new block and for the site thereof was subscribed by friends of the institution as a gift and not as a loan. The remainder of the sum required was borrowed at interest, and was in process of being gradually paid off out of the said profits. The total of the amounts subscribed by friends of the institution towards the purchase, equipment, and construction of the various homes above referred to exceeded 12,300*l.*, of which sum about 4000*l.* was subscribed towards the cost of building the said new block."

"14. I found as a fact that, although the carrying on of the said Victoria Home new block does result in a profit, it is not in any sense carried on for the sake or purpose of making such profit, but is carried on solely for the purpose of assisting the poorer classes of the population. Upon the facts stated, I held that the case of *Booth* v. *Ferrett* (1) was not distinguishable, and that I was bound by it, and I accordingly dismissed the information."

Jelf, Q.C. (*W. C. Ryde* with him), for the appellant. The magistrate decided that he was bound by the decision in *Booth* v. *Ferrett*. (1) That case has now been overruled by *Logsdon* v. *Booth*. (2)

[He was stopped.]

Daldy, for the respondent. The institution in this case is distinguishable from the Salvation Army shelters which were the subjects of decisions in *Booth* v. *Ferrett* (1) and *Logsdon* v. *Booth*. (2) Here the lodging was provided for men of a superior class to the very poorest. This is shewn by the rate charged and by the accommodation given. The Common Lodging Houses Acts of 1851 and 1853 were not intended to apply to such a place as this. What those Acts meant by a common lodging-house is shewn by the description given by the Law Officers in 1853 (3) as a place "where persons of the poorer class are received, and, although strangers to one another, are allowed to inhabit one common room." It is essential to a common

(1) (1890) 25 Q. B. D. 87.
(2) Ante, p. 401.
(3) See ante, at p. 412; Glen's Public Health, 12th ed. p. 163; Lumley, Public Health Act, 5th ed. p. 99.

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lodging-house that the sleeping accommodation should be in common. Here, unlike the Salvation Army shelters, the inmates had separate sleeping rooms or separate cubicles, and the fact that they shared the living rooms in common is immaterial.

Jelf, *Q.C.*, replied.

CHANNELL J. In this case, which was argued before us yesterday, we have now to give judgment, and I think myself it is a case of some difficulty for reasons which I will explain. We have the advantage of having had quite recently an authoritative decision (1) upon a point which is extremely similar, namely, upon the question whether a Salvation Army shelter was a common lodging-house, and we had yesterday the judgment in that case read; and when the facts of this present case were read from the special case, I confess that it struck me in the first instance that the two institutions were practically identical. But some distinctions between them have been pointed out. There is no doubt that this is, if I may say so, a somewhat higher class of thing than the Salvation Army shelter, and consequently, if we did that which is so very easy to do, namely, simply say that the facts of this case are so like the facts in the other case that we cannot distinguish between them, we should be starting the Courts upon a sort of progress which anybody who knows case law at all knows is constantly taking place, and we might lead the Courts into ultimately deciding that something is a common lodging-house which nobody who began at the beginning would say was a common lodging-house at all; consequently, is very necessary, as it seems to me, to look, not only at whether this institution is so like the other one that we are bound to say that if one is within the description of "common lodging-house" the other must be, but also to look at the previous case and try and find out if we can where the line has been drawn, and then to see, not merely whether this case is only one very small step beyond the other case, but whether that small step does not cross that line. That being so, it seems to me that we have got to look and see if we can what

(1) *Logsdon* v. *Booth*, ante, p. 401.

principle was laid down in the case of *Logsdon* v. *Booth* (1) to define a common lodging-house.

Now there have been, I think, four different things mentioned in the various cases upon the subject as either the only tests, or as some of the possible tests, as to whether a place was a common lodging-house or not. One of those, namely, the one that was applied in *Booth* v. *Ferrett* (2), as to the institution being one not carried on for profit, has been conclusively disposed of by the decision of *Logsdon* v. *Booth*. (1) One of the four, therefore, has been got rid of altogether, and it is the one upon which the case before us was decided below, because, at the time that it was before the magistrate, *Booth* v. *Ferrett* (2) was standing as an authority, and this case, coming within the principle laid down in that case, was decided by the magistrate upon that case. But the case before us sets out the facts sufficiently, I think, for us to be able to form our judgment on the question whether the facts of this case bring the institution within the description of a "common lodging-house" upon other grounds.

Now, the other three tests that have been mentioned are these: first of all, that a "common lodging-house" means a low-class lodging-house, a lodging-house for people of low class. I do not mean to use the word offensively, because of course they often cannot help it, but a class of society who are dirty, likely to be diseased, and in an insanitary condition. Now, all the cases I think agree that that is one element of a common lodging-house, and that unless the place is a lodging-house for people of that class it does not come within the description "common lodging-house"; but it does not quite follow that that is conclusive. That is necessary, and I think that that element exists in the present case. It is true that in this case efforts have been made by the benevolent people who carry on the institution to raise these poor people and make them cleaner and better in many ways, and the result is that a certain number of their inmates are somewhat above the average of the people in a common lodging-house; but it is only a certain number. What is found at the end of paragraph 6

(1) Ante, p. 401. (2) 25 Q. B. D. 87.

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of the case is that: "a certain number of the lodgers are of a better class than the 'dosser' or inhabitant of an ordinary common lodging-house, but substantially the lodgers are of the 'dosser' description." Now, that being so, this institution fulfils that requirement of a "common lodging-house." Then another thing has been suggested, which was apparently the principle of the decision in *Langdon* v. *Broadbent* (1), namely, that common lodging-house meant a lodging-house which is open to all comers. "It is evident," says Lindley J. in that case, "that the kind of house that is meant is one that is open to all comers, and therefore requires supervision in order to ensure cleanliness. The upper classes in society are fastidious and will not go to dirty houses. They, therefore, exercise the necessary supervision for themselves. That this house did require such supervision is shewn, I think, by the evidence as to the class of persons who frequented it." Now, if that meant that in order that a house should be a common lodging-house it must be open to all comers in the sense that the keeper of the house cannot refuse admission to any applicant—then that proposition has been clearly negatived by the decision of *Logsdon* v. *Booth*. (2) The Lord Chief Justice there points out (3): "We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunken or disorderly or uncleanly men, or men of known evil reputation as thieves and the like, or indeed any persons whom he chose to exclude"—that is to say, that a person who keeps what is admittedly a common lodging-house, and is, in point of fact, registered, may still, if he please, exclude persons whom he thinks unsuitable, and he is not under any obligation at common law, or by statute or otherwise, to take in everybody. I think that what was laid down in *Langdon* v. *Broadbent* (1) has been explained to mean that where the place is so open to all comers that the fact of a person being dirty and being possibly infectious, being in fact of such a character and appearance that he is likely to disseminate something that is offensive or dangerous amongst the other people with whom

(1) (1877) 37 L. T. 434.

(2) Ante, p. 401.

(3) Ante, at p. 412.

he is associated—the fact that it is open to people of that class, and that they are not necessarily excluded by reason of their being of that class, is a necessary element to bring the house within the mischief of the statute. In that sense it seems again that this institution comes within it. The words of the Lord Chief Justice which I have just read, "We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunken or disorderly or uncleanly men, or men of known evil reputation as thieves and the like," are almost identical with the words found in this case as to what people are in fact excluded: "Only men are admitted as lodgers. Men who are drunk and disorderly, or who are suspected of being criminals or who are verminous, are not admitted. Save as aforesaid, all comers (being men) are admitted upon payment to the said new block." Consequently, and so far as this requirement of a common lodging-house is concerned, the present institution seems to come within the meaning of the expression "common lodging-house" as used in the Acts of Parliament. I think, therefore, that that requirement is met.

Then there remains one point only. It has been suggested that "a common lodging-house" means a place where people live in common. The definition of the law officers of the Crown, who were filling that position at the time or shortly after these Acts of Parliament were passed, is quoted by the Lord Chief Justice in *Logsdon* v. *Booth* (1): "We know of no better description of a common lodging-house than that given many years ago by the law officers, Sir Alexander Cockburn and Sir W. Page Wood, to the effect that a common lodging-house was that class of lodging-house in which persons of the poorer class are received for short periods"—the expression "short periods" was afterwards explained by them, but I do not think anything particular turns upon that—"and although strangers to one another are allowed to inhabit one common room." The Lord Chief Justice goes on to say: "If this be the proper description of a common lodging-house, as we think it is, we cannot see in what material respect it differs from the respondent's shelter." What does that mean—"although

(1) Ante, p. 401, at p. 412.

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strangers to one another are allowed to inhabit one common room"? Mr. Daldy says "inhabit" necessarily means sleeping in the same room with each other. It must be remembered that in *Logsdon* v. *Booth* (1) the people did sleep in one common room, and it was not necessary for the judges there to consider whether that was an essential element of a common lodging-house or not; but there is a previous passage in the judgment to this effect (2): "If large numbers of the most wretched class are lodged in common sleeping rooms, insanitary conditions are, in the absence of inspection, supervision, and control, likely to arise, and it was the object of the law to secure that inspection, supervision, and control." I do not think that it is necessary for us to say whether or not sleeping in the same bedroom is an essential to making a house a common lodging-house. There is, of course, the decision in *Langdon* v. *Broadbent* (3), where the Court refused to send back the case to be restated on the question whether or not the lodgers did sleep in the same bedroom. That is some authority for saying that it is not necessary that they should do so in order to constitute a common lodging-house. On the other hand, it may be said that the judges in *Logsdon* v. *Booth* (1) dissented from that proposition; but, as I have said, I do not think that it is necessary for us to lay down any definite rule as to that, because no doubt each case must depend very largely on its own circumstances. This much, however, I think is necessary: in order to make it a common lodging-house the people who are admitted to it, and who must be of the character I have already mentioned, must be allowed so to associate with each other as to make the danger of these insanitary conditions likely to arise and likely to spread. If that is, as I think it is, the important test in the matter, then I think we are bound to say that the present institution comes within it. The lodgers here do associate with each other in a way which is within the mischief against which the Act of Parliament provides. Their living rooms are all in common, and their sleeping rooms are only partially separated. The cubicle arrangements are really not

(1) Ante, p. 401.

(2) Ante, at p. 411.

(3) 37 L. T. 434.

much more than curtains dividing the beds. They are no more than screens provided for the purposes of decency, and not for the purpose of preventing infection from spreading, nor would they in fact have that effect.

Taking that view of the facts, we are, I think, bound to say, applying the principles laid down in *Logsdon* v. *Booth* (1), that this institution is a common lodging-house. The difficulty that I have felt arises, as I said, from the fact that this institution is provided for persons of a somewhat superior class to those for whom the shelter was provided in *Logsdon* v. *Booth*. (1) The charge made is rather above the average, and somewhat better arrangements are made for the inmates. Further, regulations are made by the trustees who carry on the institution which are intended to have the same effect as the regulations made under the Act of Parliament. It is, however, impossible to hold that, because the proprietor of what would otherwise be a common lodging-house himself endeavours in effect to carry out the object of the Act of Parliament, therefore it is not a common lodging-house. That would be to leave it to the proprietor to do or not to do what the Act has made compulsory. Even if he does it, it would be impossible to say that that in itself takes the institution out of the category of common lodging-houses. No doubt this decision goes a step further than *Logsdon* v. *Booth* (1), but it seems to me that it is not a step which takes us over the boundary of the definition of common lodging-houses. I would only desire to add that the observations at the end of the judgment of the Lord Chief Justice in *Logsdon* v. *Booth* (1) are equally applicable to this case, and that we trust that those who are charged with the enforcement of the law will do all that they can to avoid acting unreasonably or harshly in carrying it into effect. I feel bound to say that, although I hold that this institution is a common lodging-house to which the Act applies, nevertheless it appears to me to be an institution which is as well managed as it is likely to be when the regulations affecting common lodging-houses are applied to it. It does not appear in fact to require much intervention or interference on the part of the authorities.

The result is that, in my opinion, the appeal must be allowed.

(1) Ante, p. 401.

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BUCKNILL J. I agree, and will only add a few words. The Legislature probably acted very wisely in omitting from the Acts of 1851 and 1853 any definition of the expression "common lodging-house." There are various classes of institutions which were started and are supported by benevolent persons with the object of relieving misery and providing temporary accommodation for poor people. Some of those institutions there may be which certainly could not be called "common lodging-houses" within the meaning of the Acts. Others, like the shelter in the case of *Logsdon* v. *Booth* (1), do fall within the Acts. Now, where are we to place this institution? It is, in fact, an annexe to a place which is already registered as a common lodging-house, and it accommodates some 128 people who occupy separate beds. Every room in the house (except the bedrooms, as to which I will say a word presently) is occupied in common, and it is quite clear that the inmates live in common during the day. Those inmates are substantially of what is known as the "dosser" class—that is to say, persons who are not only very poor, but who are frequently diseased and in an insanitary condition. The Acts are sanitary Acts, and their object was to compel registration and inspection of houses where persons of this class congregated. It does not seem to me to be necessary to decide whether or not the cubicles in which the inmates slept are to be taken as constituting separate rooms in law. I base my judgment on the fact that the people who occupy this establishment are persons of the poorest class, are often persons in an insanitary condition, and that they live together in common during the day. That of itself seems to me to be sufficient to make it a common lodging-house within the meaning of the Acts of Parliament. It seems to me to be the sort of institution which, however well managed, ought to be inspected by persons appointed by law.

I think, therefore, that the magistrate was wrong.

Case remitted to magistrate.

Solicitor for appellant: *Blaxland.*

Solicitors for respondent: *Fowler, Perks & Co.*

(1) Ante, p. 401.

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Feb. 6, 7.
March 2.

DURANT & CO. *v.* ROBERTS AND KEIGHLEY, MAXSTED & CO.

Contract—Principal and Agent—Sale of Goods—Ratification—Undisclosed Principal.

A contract made by a person intending to contract on behalf of another, but without his authority, may be ratified by that other, and so made his own, although the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

So *held* by Collins and Romer L.JJ., A. L. Smith L.J. dissenting.

APPLICATION by the plaintiffs for a new trial in an action tried before Day J. and a jury.

The action was for non-acceptance of wheat sold by the plaintiffs to the defendants.

It appeared from the evidence for the plaintiffs that the defendants Keighley, Maxsted & Co. had through their manager authorized the defendant Roberts to purchase on joint account of himself and them 500 tons of red wheat at 44*s.* 3*d.* per quarter and 500 tons of white wheat at 45*s.* 3*d.* per quarter. Roberts being unable to effect the purchase of the wheat at those prices, without authority from Keighley, Maxsted & Co., bought from the plaintiffs 500 tons of red wheat at 44*s.* 6*d.* per quarter and 500 tons of white wheat at 45*s.* 6*d.* per quarter. He subsequently had an interview with Keighley, Maxsted & Co.'s manager, and informed him of the purchase, whereupon he said that Roberts had given too much, but he thought the wheats were worth it, and told him to take them. The contracts purported in the contract notes to be made between the plaintiffs and Roberts only, and it did not appear that Roberts mentioned any principals when making the contracts. It was contended for the plaintiffs that upon the evidence the proper inference was that Roberts had, when he made the contracts, intended to act on joint account of himself and Keighley, Maxsted & Co., and that the latter had subsequently ratified

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the contracts and were therefore liable upon them. Roberts had allowed judgment in the action to go against him by default. The learned judge held that, inasmuch as Roberts in making the contracts had not professed to act on behalf of any principal, there could be no ratification by Keighley, Maxsted & Co. of the contracts. He therefore directed a verdict and judgment for the defendants, Keighley, Maxsted & Co.

Feb. 6, 7. *Robson, Q.C.*, and *Scrutton*, for the plaintiffs. It is not necessary, in order that there may be a ratification of a contract made by an agent in excess of his authority, that the contract should have been made expressly for a principal. If the agent intended to make the contract on behalf of a principal, it may be ratified by the principal so as to bind him. Passages may be found in which learned judges, speaking of the doctrine of ratification, have used expressions tending to shew that the contract must have purported to be made for a principal; but in those cases the judge was not exhaustively defining the cases in which there may be ratification, but only stating the doctrine as generally applicable. There is no authority which actually decides that a contract can only be ratified if it was expressly made for a principal. It is submitted that on principle there is no reason why that should be so, and there are dicta to the contrary. In *Foster* v. *Bates* (1) Parke B. in delivering the judgment of the Court said: "where one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command"; and see per Cockburn C.J. in *Matheson* v. *Kilburn*. (2) No hardship can be occasioned to the other contracting party in such a case any more than in any other case of an undisclosed principal, because the contract can only be enforced by the principal subject to all rights which existed against the agent. The general principle on which the doctrine of ratification rests is that ratification is equivalent to an antecedent authority. There is no reason why that should not

(1) (1843) 12 M. & W. 226; 1 D. & L. 400; 13 L. J. (Ex.) 88; 7 Jur. 1093.

(2) Only reported in 1 Sm. L. C. 10th ed. p. 349.

apply in the case of an undisclosed as well as in the case of a disclosed principal.

[They cited *Anonymous Case* (1), cited in notes to *Armory* v. *Delamirie* (2); *Bird* v. *Brown* (3); *Ancona* v. *Marks* (4); *Soames* v. *Spencer* (5); *Hull* v. *Pickersgill* (6); *Hagedorn* v. *Oliverson* (7); *Ridgway* v. *Wharton* (8); *Vere* v. *Ashby* (9); *Bolton Partners* v. *Lambert*. (10)]

Carver, *Q.C.*, and *Danckwerts*, *Q.C.*, for the defendants. The whole current of authority, with one or two slight exceptions, is in favour of the view that the doctrine of ratification only applies in the case of contracts expressly made, or acts expressly done, on behalf of a principal. The terms in which the doctrine has been stated over and over again by judges import that a contract made or act done without authority can only be ratified where it purported to be made or done on behalf of a principal. If a man makes a contract in his own name, not having any principal nor affecting to act for one, he is himself the party to the contract, and another party cannot be introduced into the contract by ratification. There is in such a case nothing to ratify. It may not be necessary that the name of the principal for whom the person making the contract affects to act should be stated, but he must affect to act for a principal, or the doctrine of ratification will not apply. The ground upon which an undisclosed principal is admitted to sue or be sued on a contract made in the agent's name is the principle that "Qui facit per alium facit per se." This cannot apply where the contract was made without any authority from an undisclosed principal. It is submitted that the cases of *Saunderson* v. *Griffiths* (11) and *Wilson* v. *Tumman* (12), which was approved

(1) (Mich. 28 & 29 Eliz.) Godb. 109.
(2) 1 Sm. L. C. 10th ed. p. 343, 348.
(3) (1850) 4 Ex. 786.
(4) (1862) 7 H. & N. 686.
(5) (1822) 1 D. & R. 32; 24 R. R. 631.
(6) (1819) 1 B. & B. 282; 3 J. B. Moore, 612; 21 R. R. 598.
(7) (1814) 2 M. & S. 485; 15 R. R. 317.
(8) (1857) 6 H. L. C. 238.
(9) (1829) 10 B. & C. 288; 34 R. R. 408.
(10) (1889) 41 Ch. D. 295.
(11) (1826) 5 B. & C. 909; 8 D. & R. 643.
(12) (1843) 6 M. & G. 236.

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of in the Exchequer Chamber in *Woollen* v. *Wright* (1) are distinct authorities for the defendants. The expressions attributed to Parke B. in *Foster* v. *Bates* (2) by the report in Meeson & Welsby differ somewhat from those reported in the other reports of the same case. In the latter what he is made to say is consistent with the defendants' contention. If the defendant Roberts had made the contract expressly on behalf of himself and some person other than Keighley, Maxsted & Co., it would be impossible to contend that they could ratify it. What difference does it make that he made it expressly on behalf of himself alone? It would be very inconvenient in such cases to have to inquire whether the intention of the person effecting the contract was to contract on behalf of a principal, or not, in the absence of any expression of such an intention to the other contracting party.

[They also cited *In re Tiedemann* v. *Ledermann Frères* (3); *Higgins* v. *Senior* (4); *Trueman* v. *Loder* (5); *Falcke* v. *Scottish Imperial Insurance Co.* (6); *Watson* v. *Swann* (7); Story on Agency, § 251 a.]

Scrutton, in reply. The arguments for the defendants Keighley, Maxsted & Co. are really inconsistent with the whole doctrine of law with regard to undisclosed principals; for in every case of an undisclosed principal the contract is ostensibly, and so far as the intention of the other party is concerned, made with the agent, and it clearly is not necessary that the agent should expressly state that he is acting for a principal. There is really no greater difficulty in principle in the introduction of a party into a contract by means of subsequent ratification by him in a case where the person making the contract did not affect to act for a principal than in a case where he did. There being by the hypothesis no antecedent authority to make the contract in either case, in neither could the maxim

(1) (1862) 1 H. & C. 554.
(2) 12 M. & W. 226; 1 D. & L. 400; 13 L. J. (Ex.) 88; 7 Jur. 1093.
(3) [1899] 2 Q. B. 66.
(4) (1841) 8 M. & W. 834.
(5) (1840) 11 Ad. & E. 589.
(6) (1886) 34 Ch. D. 234.
(7) (1862) 11 C. B. (N.S.) 756; 31 L. J. (C.P.) 210.

"Qui facit per alium facit per se" apply at the time when the contract was made.

Cur. adv. vult.

March 2. A. L. SMITH L.J. read the following judgment:— The question in this case is whether a contract made by a principal with, what I will call, an unauthorized agent in the latter's name, which contract does not purport or profess to be made by the unauthorized agent on behalf of any one excepting himself, and as regards which contract he has not when he made it assumed to be acting on behalf of any one excepting himself, is capable of being ratified by a stranger, if it be shewn that the unauthorized agent had at the time he made the contract the undeclared intention in his own mind of making the contract for a person who had never authorized him to make it.

It was said by the learned counsel for the appellants that this question had never been decided, and that the law was that, if an unauthorized agent—that is any one—had in his own mind, when he entered into a contract with another, the undeclared intention of making it on behalf of himself and of some other person, or of some other person alone, that other person could ratify the act of the unauthorized agent and thus become as if he had been a party to the contract ab initio. It struck me, when I heard this proposition put forward by the appellants' counsel (that is by the plaintiffs' counsel), that it was not in accord with my recollection of the law; for I thought it had been long ago well engrained into the law of England that a stranger in such circumstances could not ratify; and, having had my memory refreshed at great length by the cases upon the subject, I find that my recollection has not played me false. It will be seen hereafter that very learned judges over and over again have stated the law as regards ratification to be that, unless the contract made by the unauthorized agent purports or professes (which in my judgment is the same thing) to have been entered into on behalf of another, or the unauthorized agent, when he made the contract, assumed to be making it on behalf of another, then

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the contract made by the unauthorized agent is not capable of being ratified by a stranger to it; for to be capable of being ratified the contract must purport or profess to have been entered into by the unauthorized agent on behalf of another, or the agent must have assumed by what he did when he entered into the contract to have been acting on behalf of some person who afterwards proposes to ratify. I find that every learned judge who has dealt with the question during the last three quarters of a century at least has affirmed the doctrine of ratification to be as above stated, with a most remarkable unanimity of opinion, and there is only one solitary instance to the contrary to be found in the books, namely, the judgment of Cockburn C.J. in the case of *Matheson* v. *Kilburn* (1), which I will refer to hereafter, and in which Lord Cairns and Brett L.J. differed from the Lord Chief Justice, and, in my opinion, decided the point now raised in this case adversely to the appellants.

Before I deal with this consensus of judicial opinion I would point out that the learned junior counsel for the appellants, in order to meet this undeniable difficulty in his way, with a courage which distinguishes him, roundly asserted that the statements by the judges to be found in the books were mere obiter dicta, and should be discarded as worthless, and were not decisions upon the point. This struck me as remarkable. But I find that my brothers Collins and Romer are of opinion that this doctrine of ratification has never yet been decided, and they think that it is therefore necessary to begin ab ovo, and go back to the Roman law and other ancient works to try and ascertain what is or ought to be the law upon the subject, and to see whether what all the learned judges (with the one exception) have been saying throughout the last century is correct or not.

The point argued is that it is an anomaly that the law relating to contracts entered into by an unauthorized agent without any principal behind him should not be the same as that relating to contracts entered into by an authorized agent with an undisclosed principal behind him, and it is said that

(1) Only reported in 1 Sm. L. C. 10th ed. p. 349.

according to first principles the law should be the same as regards each. In my opinion, as I will hereafter point out, it is far too late to deal with this case upon such considerations; and, indeed, it seems to me, if it were not so, that the law relating to authorized agents with undisclosed principals behind them is far more anomalous than that relating to unauthorized agents with no principals behind them; and therefore the argument that the law should be held to be the same in each case does not appear to me to be of any weight, and I do not see why the law applicable to an unauthorized agent should be levelled down to that applicable to an authorized agent.

In my judgment to call the phalanx of judicial authority to which I must necessarily refer mere dicta is a misnomer altogether; and I must point out that, with the exception of Cockburn C.J., the appellants cannot produce a single decision or even a dictum of a single judge in opposition to what they now call mere dicta, and which are all adverse to the appellants' contention.

I will now state how the present case arises. Roberts, one of the defendants, by contracts in writing in the months of April and May, 1898, purchased certain wheat of the plaintiffs. The only material part of those contracts as regards the point in hand is as follows: "Bought of Messrs. Durant & Company, London . . . . for F. O. Roberts, Esq., Wakefield, five hundred tons of wheat. Signed, Burgett and Newson, Brokers." The contract, it will be noticed, is made solely in the name of Roberts, so far as the buyer is concerned, and gives no intimation that it is made on any other person's behalf (which in fact it was not), nor did Roberts or the brokers assume that he or they were acting on any person's behalf excepting that of Roberts, when the contracts were made. Roberts having failed to take the wheat purchased by him, the plaintiffs, Durant & Co., thereupon sued him and also the firm of Keighley, Maxsted & Co. for damages for breach of their contracts. Roberts let judgment go by default, and the question is, Can the plaintiffs now make Keighley, Maxsted & Co. liable upon these contracts? It is admitted that Roberts had no authority

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whatever to enter into these contracts on behalf of Keighley, Maxsted & Co. He had no principal behind him whatever. Roberts says that in his own mind he intended, when he entered into the contracts, that they should be on joint account of himself and Keighley, Maxsted & Co.; in other words, he expected and hoped that Keighley, Maxsted & Co. would join him in the contracts after he had made them, as he in fact did, in his own name and on his own account.

To raise the point of law which has been argued before us, I will take it that Roberts is to be believed when he states what he expected and hoped Keighley, Maxsted & Co. would do after he (Roberts) had entered into the contracts with the plaintiffs, that is, take a joint venture in the wheat speculation, and there is evidence fit to be left to a jury that Keighley, Maxsted & Co. did afterwards desire to do so.

The question argued before us is this: In those circumstances are the contracts made by Roberts, not professing or purporting to be made for any one excepting himself, capable of being what is called ratified by Keighley, Maxsted & Co. so as to make them parties to the contracts made by Roberts, in which case the plaintiffs, Durant & Co., can sue Keighley, Maxsted & Co. upon those contracts, and they could sue Durant & Co. thereon?

To see how the law stands as to this, I will take the case of *Saunderson* v. *Griffiths* (1), decided over seventy years ago in the remarkable and unbroken sequence of authority which I am now coming to. There the question arose whether A., who was no party to the contract sued on, could take advantage of and sue upon the contract. The doctrine of ratification was resorted to on his behalf. The contract sued on purported to be made by an agent on behalf of B. and C., not of A. Holroyd J., when dealing with the doctrine of ratification, said (2): "It was said, however, that he" (A.) "at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement ab initio. There might have been some weight in that argument, if the agent at the time when he made the agreement had *professed* to have

(1) 5 B. & C. 909.

(2) 5 B. & C. at p. 915.

authority to act for the husband" (A.), "because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter *professed* to act." It is said that this case is not in point, but I do not agree, for it shews that Holroyd J., when dealing with ratification, distinctly says that the argument as to ratification would have had weight if the agent had *professed* to act for A. at the time when he made the contract. In my judgment a man keeping an intention locked up in his own mind is not "professing" to act for another when he makes the contract, and to hold otherwise would not, I think, be in accord with plain language. Many years afterwards, in *Bobbett* v. *Pinkett* (1), Amphlett B. expressly recognised what Holroyd J. had said in *Saunderson* v. *Griffiths* (2), saying: "Suppose B., *professing* to act as A.'s agent, but in fact not authorized, enters into a contract with C.; would not A. by subsequently ratifying B.'s act be entitled to sue C. on the contract in his own name?" This is a dictum, but the learned Baron fully recognises the judgment of Holroyd J., which I think was no dictum at all, and again he lays stress upon the phrase "professing to act." In the year 1829, in the case of *Vere* v. *Ashby* (3), Parke J., afterwards Parke B., states the rule as to ratification thus. He says: "The rule as to ratification applies only to the acts of one who *professes to act* as the agent of a person who afterwards ratifies. Here Rowland at the time when the first bill was discounted did not *profess* to act as the agent of Shaw." I have already said what I think is the meaning of the word "profess." It does not describe an undeclared intention locked up in a man's own mind. The appellants' counsel may call this a dictum if he likes. In my judgment it is a deliberate declaration of a most learned judge as to what is the rule of ratification according to the law of England, and, as will be seen hereafter, is repeated by the

(1) (1876) 1 Ex. D. 368, at p. 375. (2) 5 B. & C. 909.
(3) 10 B. & C. 288.

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learned judge when Lord Wensleydale in the House of Lords. In *Wilson* v. *Tumman* (1) in 1843 the question arose whether the defendant was liable for a seizure of the plaintiff's goods by the sheriff, and it was argued that, although the defendant had given no precedent authority to the sheriff to take the plaintiff's goods, yet he had ratified the taking after it was made. The sheriff when he took the plaintiff's goods did not purport to do so on behalf of Tumman, and Tindal C.J., in delivering the unanimous judgment of the Court of Common Pleas, said: "The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant of a taking under such circumstances is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not. That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority." The Chief Justice then cites the Year Book, 7 Hen. 4, and Godbolt's Reports, 109, and he adds: "They (the sheriff's officers) did not *assume to act* at the time as agents or bailiffs of the then plaintiff Tumman." The Court therefore held the defendant not liable. The appellants' counsel calls this a mere dictum of the Court of Common Pleas. He may say so, but I do not agree with him. Moreover, twenty years afterwards, in the year 1862, in *Woollen* v. *Wright* (2) in the Exchequer Chamber, consisting of Wightman, Williams, Crompton, Willes, Byles, and Blackburn JJ., Wightman J., delivering the unanimous judgment of the Exchequer Chamber, expressly approved of the decision in *Wilson* v. *Tumman* (1), and stated that it had "not been disputed until the present case." In the year 1850 Rolfe B., when delivering the unanimous

(1) 6 M. & G. 236. (2) 1 H. & C. 554.

judgment of the Court of Exchequer in *Bird* v. *Brown* (1), again dealt with the doctrine of ratification. He said: "The doctrine 'omnis ratihabitio retrotrahitur et mandato æquiparatur' is one intelligible in principle and easy in its application when applied to cases of contract. If A. B., unauthorized by me, makes a contract *on my behalf* with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; . . . . In cases of tort, there is more difficulty. If A. B., *professing to act* by my authority, does that which primâ facie amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. . . . . But the authorities go much further and shew that in some cases where an act which, if unauthorized, would amount to a trespass, has been done *in the name and on behalf of another*, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction." In the year 1857 Lord Wensleydale in the House of Lords in *Ridgway* v. *Wharton* (2) said: "If a man, *professing to act* for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before according to the old maxim, 'omnis ratihabitio retrotrahitur et mandato æquiparatur.'" Here I find the learned judge as Lord Wensleydale reiterating in the House of Lords what as Parke J. he had declared eight and twenty years before to be the rule as to ratification in the case of *Vere* v. *Ashby*. (3) Again in 1862 in *Watson* v. *Swann* (4), which was an action upon a policy of insurance entered into

(1) 4 Ex. 786.
(2) 6 H. L. C. 238, at p. 296.
(3) 10 B. & C. 288.
(4) 11 C. B. (N.S.) 756.

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by John Smith in his own name, Erle C.J. and Willes J. deal with ratification as follows. The Chief Justice says: "It is clear law that no one can sue upon a contract unless it has been made by him or has been made by an agent *professing* to act for him, and whose act has been ratified by him." (There was no question in that case nor in the present of an authorized agent acting for an undisclosed principal.) "Now here the contract was not made by the plaintiff; nor did it purport to be made on his behalf: it *purported* to be made by Smith on his own behalf." Willes J. said: "To entitle a person to sue upon a contract, it must clearly be shewn that he himself made it, or that it was made *on his behalf* by an agent authorized to act for him at the time or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent *professes* to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." In the same year 1862 in *Ancona* v. *Marks* (1), and apparently before the judgment in the Exchequer Chamber in *Woollen* v. *Wright* (2) had been delivered, Wilde B. adopts and distinctly approves of the case of *Wilson* v. *Tumman* (3), and Martin B. in his judgment does the same, and adds: "In the note to *Armory* v. *Delamirie* in Smith's Leading Cases there occurs the following passage. 'And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification is tantamount to a prior command of an act done *in the name of* the party who ratifies. So that, where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in *the name, or as one acting by* the authority, of the person entitled (whether to his advantage or not) and obtained his subsequent ratification.'" In 1868 Blackburn J. in the case of *Lord* v. *Lee* (4), when dealing with

(1) 7 H. & N. 686.
(2) 1 H. & C. 554.
(3) 6 M. & G. 236.
(4) (1868) L. R. 3 Q. B. 404.

a question involving that of ratification, is in line with all those who had preceded him upon this point. That learned judge says: "Now it is also a principle of the common law that, whenever an act is done by a person *professing to act* for another, though in reality he had no authority at the time, (subject to exceptions which do not affect the present case) the ratification of that other had the same effect as if the authority had been originally conferred, so as even to affect the vested rights of third persons. . . . . It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so: the act having been done under the *professed* authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority."

Are all the above mere dicta? I cannot think so.

In 1877 the point now taken was expressly raised, and, as it seems to me, determined, by Lord Cairns and Brett L.J. dissentiente Cockburn C.J., in the case of *Matheson* v. *Kilburn*. (1) In that case a person intending to buy on behalf of another, but without authority, and without *avowing* that he was acting for another, bought goods in his own name. Lord Cairns and Brett L.J. were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another. I know that Cockburn C.J. dissented; but can anything be clearer than what the majority, Lord Cairns and Brett L.J., held to be the law? This case is, I believe, only reported in 1 Smith's Leading Cases, 10th ed. 349. The last case which I will cite, for those which I have cited are, in my opinion, ample, is that of *Falcke* v. *Scottish Imperial Insurance Co.* (2) in 1886. In that case Bowen L.J. states clearly what I believe the law to be, and what in my opinion is shewn by the cases I have had to cite at such length to be the law. That very learned Lord Justice said: "There is nothing more vague than the way in which the word 'adoption' is used in arguments at law, and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such

(1) 1 Sm. L. C. 10th ed. p. 349. (2) 34 Ch. D. 234, at p. 249.

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thing in law as adopting or ratifying anything except where there is the sanctioning of an act *professedly* done on your behalf in such a sense as to make you liable for it. A man can ratify that which *purports* to be done for him, but he cannot ratify a thing which purports to be done for somebody else . . . . There have been many attempts to make people liable by what is called adoption of a contract or of some other act which never purported to be made or done on their behalf, and such attempts have failed."

It will be seen that every one of the learned judges whose judgments I have cited from, when dealing with the question of ratification, has always used the following expressions as to when a contract made by an unauthorized agent is capable of being ratified by a stranger. The contract must (*a*) have "professed" to have been made on behalf of another; (*b*) have "purported" to have been made on behalf of another; (*c*) have been made "on behalf of another"; (*d*) have been made "in the name of another"; or (*e*) the agent must have "assumed to act on behalf of another"; every one of which expressions, in my judgment, is wholly inconsistent with an unauthorized agent keeping locked up in his own mind a mere undeclared intention that another shall afterwards participate in the contract.

It is not necessary I think to go through the text-books in which, as far as I have gone, I have found nothing inconsistent with what I believe to be the law as regards this doctrine of ratification, but I will cite two: one is Story on Agency, § 251 a, where it is laid down "that a ratification can only be effectual between the parties where the act is done by the agent 'avowedly' for or on account of the principal"; and the other is Kent's Commentaries, vol. ii. p. 616, note 1, Ratification, where the author says: "A person cannot ratify acts done without his authority, unless they were done for him by a person assuming to act as his agent," and for that he cites *Wilson* v. *Tumman* (1); *Watson* v. *Swann* (2), both of which are now said to be mere dicta.

The appellants in my judgment, as I have said before, are

(1) 6 M. & G. 236. (2) 11 C. B. (N.S.) 756.

unable to produce a single authority during the last two or three hundred years, even if they can produce one before, which I doubt, excepting the judgment of Cockburn C.J., dissented from by Lord Cairns and Brett L.J., in support of the proposition they now contend for. They do produce the case of *Soames* v. *Spencer* (1), in which it does not appear what was the form of contract sued on, and they also seize upon an expression of Parke B. in the case of *Foster* v. *Bates* (2) as reported in Meeson and Welsby's Reports, which is inconsistent with what I have cited of the learned judge's expressions as Parke J. and Lord Wensleydale; but it appears from the contemporaneous reports of the case in Dowling and Lowndes' Reports and the *Jurist* and *Law Journal* (3) that the expression of the learned judge is not accurately reported in Meeson and Welsby, for a material omission has therein been made, and when the accurate report of it is read, it is not in the appellants' favour.

In my judgment upon this doctrine of ratification the law has been settled for years. If I am to accede to the appellants' contention, I should have to differ from and disagree with Lord Wensleydale in the House of Lords: the Exchequer Chamber, which I could not do, even if I had desired to do so, which I do not: the Court of Appeal, consisting of Lord Cairns, Cockburn C.J., and Brett L.J., presided over by Lord Cairns, to which the same remark applies: the full Court of Common Pleas, presided over by Tindal C.J.: the full Court of Exchequer, presided over by Rolfe B.: and Parke B., before he went to the House of Lords, Holroyd J., Erle C.J., Willes J., Blackburn J., Wilde B., Martin B., and Amphlett B., and last but not least Bowen L.J.

With all submission to my learned brothers who disagree with me, I think even if I had the courage to try to differ from all these very learned judges, which I have not, it would not only be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent judges without a single discordant voice,

(1) 1 D. & R. 32.
(2) 12 M. & W. 226, at p. 287.
(3) 1 D. & L. 400; 13 L. J. (Ex.) 88; 7 Jur. 1093.

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with the exception of Cockburn C.J.'s; and in my judgment, for the reasons above, this appeal should be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

COLLINS L.J. read the following judgment:—The question raised by this appeal is whether a contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, unless the intending agent disclosed to the other party at the time of making the contract that he was acting for some one else.

Roberts, the intending agent in this case, did not disclose to Durant & Co., the sellers, that he was acting otherwise than for himself, and Day J. appears to have held that such non-disclosure rendered the contract incapable of ratification by the other defendants. In other words, that there can be no ratification by an undisclosed principal—I mean undisclosed in the sense that the existence of *a* principal has not been disclosed at the time of making the contract. This being the ground of decision, it is immaterial to consider whether there would be any difference as to the possibility of ratification where the intending agent who contracts as principal knows that he has no authority, or that he is exceeding a given authority, and the case where he is under a mistaken belief that he has authority, since the right of ratification is negatived in either case. For reasons which I will give more in detail later on, I think the point has never been actually decided, though there are numerous dicta upon it, which have become the foundation of statements in text-books more or less adverse to the appellants' contention; but it is raised now for actual decision, and I think it cannot be satisfactorily determined without examining how far these dicta are consonant with principle, and if not, whether they have been acted upon for so long as to render it undesirable for this Court, at all events, to interfere with them.

It is clear law that an act done or a contract made by a person stating that he is acting for another, but without

authority, can be ratified by that other. What, then, is the essence of this right to ratify? Does it depend on the intention with which the act was done by the would-be agent, of which what he says at the time is merely evidence, or is the open avowal of the fact by him not merely evidence, but itself an essential condition of the right to ratify? Ratification is equivalent to a prior command, and, as between the would-be agent and the person ratifying, it can make no possible difference whether the former has avowed his intention or not. The ratifier's command, had it been given beforehand, would have been equally effectually carried out, whether the agent had contracted in his own name or in terms on behalf of the principal. The intention to contract for the principal must certainly exist in the mind of the agent, since in our law the act of a mere stranger cannot be ratified. That would be, not ratification, but adoption, which our law does not admit. But, given intention existing in the mind of the would-be agent, it seems impossible to suggest any reason why from the standpoint of the agent and the ratifier avowal of it to the other contracting party should be essential, unless the rights of the principal against the other contracting party are affected by it. It would seem, then, that the reason, if any, must be sought in some difference caused to the other contracting party by reason of the non-disclosure. But where the law admits, as our law does admit, a person who has authorized another to make a contract on his behalf to sue and be sued upon it, although he is not named in the contract and his agent contracts as principal without disclosing that he has a principal, every person who makes a contract with another (excluding, of course, certain special personal contracts) must be taken to know that he may have to deal with some other person on whose behalf the contract is made. He cannot complain, therefore, of non-disclosure. He loses nothing, and gains an option of suing either the party named in his contract or the principal behind him. Indeed, any ground of supposed alteration of the position of the other contracting party that might be urged in support of the view that disclosure as well as intention on the part of the agent is necessary is succinctly disposed of by Rolfe B.

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in a well-known passage in delivering the judgment of the Court in *Bird* v. *Brown* (1), a passage other parts of which are usually relied on in support of the necessity of disclosure by the agent. He says: "If A. B. unauthorized by me makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be, or, *if he did not believe A. B. to be acting for me*, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." It would seem, then, that neither from the point of view of the ratifier nor of the other party to the contract is there any solid reason why disclosure by the would-be agent should be essential.

But it has been suggested that the nature of ratification itself presupposes a contract purporting to bind the ratifier. I can find no such limitation in the word. I think it does involve the idea of something which was intended to be done on behalf of the ratifier, and which needs nothing but confirmation, not to create it ab integro, but merely to give it validity. It does not involve the existence of a contract stating anything more on its face than would have been necessary if there had been actual prior authority. Is there anything in the word "ratification" itself to make it inapplicable to a case where an agent, believing he has authority, has made a contract intending to do it for a principal, but in his own name and without disclosing that he is agent? It is clear law that a contract may be ratified by a person unknown to the would-be agent himself, who contracting in his own name discloses the fact that he is acting for another. It cannot be contended, therefore, that it is essential to ratification that all the terms of the contract (in cases of contract) should have been already expressed either by words or in writing. This shews that

(1) 4 Ex. 786, at p. 798.

what is essential is what is intended, and not what is expressed, and, so long as the form is capable of covering what was really intended, there is nothing in the nature of ratification itself to make it inapplicable to such a case.

The doctrine of ratification would seem, as its name imports, to have come into our law from a Roman source; but, so far as I am aware, no argument can be drawn from the Digest that the person acting without authority in the affairs of another must avow that he is acting for him in order to let in ratification. On the contrary, it would seem that *contemplatio* was in that as in many analogous cases the essential point. In Dig. III., 5, 5. §§ 11. 12. we find the phrase (1)—"Ratihabitio constituet tuum negotium quod ab initio tuum non erat sed *tua contemplatione* gestum." The instance to which this observation is appended, the collection of a debt, may have involved avowal, though I am not clear that it did, but the point is that *contemplatio* is made the test.

Another illustration is given: If I exact payment from a debtor of Titius, believing that you are the heir of Titius, whereas in fact Seius was his heir, and you afterwards ratify it, reciprocal rights will arise between you and me. For, though the affair was not really yours, ratification gets over this, and it is deemed to be yours as though you were in fact the heir. (2) It seems here that there could have been no avowal of intention to act on the part of the person whom he thought to be heir; but the ratification was effective to constitute it the act of the person for whom he in fact intended to act, though that person was not the heir. In the same article it is pointed out that the rights of a negotiorum gestor, that is a person who intervenes without authority in the affairs of another (cf. Hunter's Roman Law, 3rd ed. pp. 661–664), will depend on the *contemplatio*, i.e. the intention with which he

(1) The references are to Mommsen's edition.

(2) The Latin is as follows: "Idem ait, si Titii debitorem, cui te heredem putabam, cum esset Seius heres, convenero similiter et exegero, mox tu ratum habueris: esse mihi adversus te et tibi mutuam negotiorum gestorum actionem. Adquin alienum negotium gestum est: sed ratihabitio hoc conciliat: quae res efficit ut tuum negotium gestum videatur, et a te hereditas peti possit."

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acted: whether for instance in a given case he has acted from friendship for a son or slave, "vel eorum contemplatione" or looking to the father or master. His mental attitude is made the criterion of his rights; and this is so likewise where ratification has followed.

In the case of torts the Digest does not support the view that the act must avowedly be done on the part of the ratifier. After dealing with the case of a true and a false procurator, it says (XLIII. 16. 1, § 14): "sed et si quod *alius* deiecit, ratum habuero: sunt qui putent secundum Sabinum et Cassium, qui ratihabitionem mandato comparant, me videri deiecisse, interdictoque isto teneri: et hoc verum est. Rectius enim dicitur in maleficio ratihabitionem mandato comparari." Repeated in effect, L. 17. 152; so in L. 17. 60, which apparently applies to tort or contract, the words are "pro se gestum," which would cover the case of intention without avowal. Indeed, so far from the Digest supporting the view that there must be actual statement of intention to contract for the ratifier, it was a moot point among the commentators whether even a thing done "alieno nomine" might not be ratified: see Van Leeuwen's edition of 1663, III. 5, 6, § 6 (1), note 98, p. 109. Later on however the doctrine was expressed in the Papal Decretal mentioned in Serjeant Manning's note to *Wilson* v. *Tumman* (2) in the form, "Ratum quis habere non potest quod ipsius nomine non est gestum." This in its ordinary meaning does not necessarily or even primarily imply avowal on the part of the agent, since by a common Latin idiom a thing may be said to be done "nomine alicujus" where merely "on account of" is meant, and the possibility even of actual naming is

(1) Van Leeuwen's Corpus Juris Civilis, 1663. The passage in the Digest to which the note is appended runs thus: "Nam et si servum non necessarium emero filio tuo, et tu ratum habueris, nihil (98) agitur ratihabitione, eodem loco Pomponius scribit."

The note is as follows: "Cur ita? vide c. 9, *de regulis in* 6 & l. 60. Ĩ. *de regulis juris.* Imo aliquid agitur. *l. un. G. si in communi.* Goth. Utrum quod alieno nomine gestum sit ratum haberi possit, vid. Afflict. *decis.* 180 et posse ratum haberi tenet Thomas Grammaticus. *decis.* 103, *num.* 11. 12. 13. *num.* 47. 48, & 108, l. 56. Ĩ. *de judic.* Vide quædam singularia ad hanc materiam, apud Decium in *l. semper qui* 60. ff. *de reg. jur.* Ans."

(2) 6 M. & G. 236.

excluded. That would be the name under which he would enter it in his books if he had to record it, as was frequently necessary in Roman law. Instances of this usage are given in Facciolati. No doubt the commentator quoted in the same note regards it as requiring the name of the proposed principal to be actually stated, giving reasons from the supposed hardship on the other party to the contract, which I have already shewn can have no place in our law. This maxim is apparently the foundation of the paragraph in Story cited for the respondents. Pothier, Obligations, by Evans (Pt. I. c. 1, s. 1. art. 5, §4 [75]), in one passage uses the phrase "in the name of," and in another (ibid. [77]), "assuming to do so on my (the ratifier's) behalf." "Assuming," of course, is a neutral word amounting merely to "taking upon himself" to act for me, and "in the name of" is open to the observations already made. But, if these authorities do make the avowal of the name essential, they would seem to have gone a step beyond the Roman law while purporting to follow it; and the early English authorities seem to be more consonant with what I conceive to be the Roman law.

In the *Anonymous Case*, Godbolt, 109, following the case 7 Hen. 4, Hil. 34 (b), emphasis is laid on the intent with which the act sought to be ratified was done. "Can he," says Anderson C.J., "so father his misdemeanour upon another? He cannot, for once he was a trespasser, and his intent was manifest." This seems to point to the intention being the essential and the manifestation being only the evidence of it, and I think this view is confirmed by later authorities. In *Fuller* v. *Trimwell* (1), an action of replevin, decided on the authority of the case in 7 Hen. 4, it was objected that the averment that the defendant took as bailiff to another could not be traversed. The Court say, "and as to that which hath been objected, that if this traverse be allowed the meaning of the party shall be drawn in question—i.e., the meaning of him who took the cattel, the same is not any mischief, for so it is in other cases as in the case of recaption." *Buller's Case* (2) is to the same effect. These cases seem conclusive that the issue to be tried

(1) (Pasch. 29 Eliz.) 2 Leon, 215. (2) (Pasch. 29 Eliz.) 1 Leon, 50.

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is the intention. If so, what was said or done at the time would only be material as evidence of the intention of which there might be other conclusive evidence. And this quite accords with the attitude of our older lawyers in analogous cases. For instance, in the case of a person who, entering under a licence given by law, afterwards abused it; "for," says Coke in the *Six Carpenters' Case*, 8 Rep. 146 a, "the law adjudges by the subsequent act quo animo, or to what intent, he entered, for acta exteriora indicant interiora secreta," citing 11 Hen. 4, 75 b. The passage in the Institutes (4 Inst. c. 73, p. 317), where Lord Coke quotes the maxim in the form in which it is current in England, is quite consistent with these early authorities, and gives no support to the notion that actual statement by the agent is necessary. "He that receiveth a trespasse and agreeth to a trespasse after it be done is no trespasser, unless the trespasse was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis ratihabitio retrotrahitur et mandato æquiparatur*."

Of the more modern cases the earlier ones follow on the same lines.

Hull v. *Pickersgill* (1), decided in 1819, is really an authority that avowal is not necessary, if from the facts, of which the subsequent application for ratification is itself some evidence, "the interests of the ratifier were remembered in the seizure." There creditors, who had become such subsequent to the bankruptcy, seized the goods of the plaintiff. They knew the property in the goods was in the assignees, but did not know who they were, and "hazarded" their consent. Though they seized "for the general benefit of the unsatisfied creditors" (2) there was no evidence that they avowed their intention to seize for the assignees, and the citation by Park J. from the Year Book, whether correct or not, shews that the Court were dealing with the case on this footing. Nevertheless, the Court held the inference to be properly drawn that they intended to act for the assignees and upheld the ratification. *Soames* v. *Spencer* (3),

(1) 1 B. & B. 282; 3 J. B. Moore, 612. (2) See 3 J. B. Moore, 613.
(3) 1 D. & R. 32.

decided in 1822, a case of contract, seems to support the same view. There one of two joint owners sold goods through a broker without authority and without giving any indication, so far as can be gathered from the report, of an intention to act in any interest but his own. His co-owner at first refused to ratify, but afterwards consented, and joined in suing the vendees, who denied his right. The ratification was upheld. Holroyd J. cited a maxim which is material in the present discussion, "Omne actum ab agentis intentione est judicandum."

In *Foster* v. *Bates* (1), decided in 1843, the question was whether the administrator of an intestate could ratify a sale made by the agent of the intestate after the death of the latter for the benefit of the estate. It was held that he could, and Parke B., in delivering the judgment of the Court, says (2): "The sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator; and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent." This case, therefore, also gives no countenance to the view that avowal on the part of the intending agent is necessary; nor do the words added in the report in the *Jurist* relied upon by the respondents—namely, "and acts accordingly"—seem to me to make any difference. But two cases decided before *Foster* v. *Bates* (1) were said to be authorities for the necessity of avowal. It will be found, I think, when examined, that they do not touch the point. In the first, *Saunderson* v. *Griffiths* (3), decided in 1826, an agreement of letting had been made in writing by one Murray, "agent for and on behalf of" two named ladies, one of whom, Mrs. Saunderson, was married. The question was whether the husband of Mrs. Saunderson, who had received rents under the agreement, had thereby become a party to it, so as to be properly joined as plaintiff in an action

(1) 12 M. & W. 226. (2) 12 M. & W. at p. 233.
(3) 8 D. & R. 643; 5 B. & C. 909.

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against the tenant for breach of some of the stipulations. It was held that he had not. It was held that no parol evidence was admissible to explain or vary the contract, and Bayley J. adds: "The husband does not appear to have had any authority himself to enter into an agreement or to authorize anybody to execute it on his behalf. He was a mere stranger to the instrument." Holroyd J., after stating that the agent was authorized to act for the two ladies only, says: "If indeed he had assumed the power of including the husband as a party, the subsequent assent of the latter might have had relation back." Apart from the objection to admitting evidence to vary the written contract, it was quite clear that the agent had no intention whatever of contracting on behalf of the husband. The case has no bearing, therefore, on this discussion, neither do any phrases in the judgments support the respondents' contention. The word "assume" is neutral. The second case is *Vere* v. *Ashby* (1), decided in 1829. The point there was whether a person who had become a partner in a firm after a bill had been indorsed by one of the partners in the then partnership name (which had not been changed on the introduction of the new partner) had made himself liable on the bill by ratification. It was held that he had not. Here, again, it was quite clear that the partner who indorsed could not have intended to indorse on behalf of a person who was not a member of the firm. It is in reference to these facts that Parke J. says: "The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies." I think it is straining the meaning of the learned judge to suggest that in such connection he meant by using the word "profess" to indicate more than that the agent had no intention, did not in fact take upon himself, to contract on behalf of a stranger. Clearly no more was necessary. In 1843, the same year as *Foster* v. *Bates* (2), was decided *Wilson* v. *Tumman* (3), which was much relied upon by the respondents. This case again, so far as the decision itself is concerned, does not touch the present case. The point was whether an execution creditor

(1) 10 B. & C. 288.

(2) 12 M. & W. 226.

(3) 6 M. & G. 236.

could by ratification make himself liable for a trespass by the sheriff's officer in executing the writ. It was held that the sheriff was the agent of the law and not of the creditor, i.e., that he did not in fact act on behalf of the creditor, but of some one else, and therefore that the creditor could not ratify what was not done on his behalf. The decision, therefore, is in full accordance with the earlier cases above mentioned; but some of the expressions used in the judgment of Tindal C.J. might, apart from their context, seem to go further. He says: "An act done for another by a person not assuming to act for himself, but for such other person," may be ratified. He cites the cases in the Year Book and the case in Godbolt above referred to in support of this proposition, shewing that what he is really dealing with is the case where the alleged agent has made clear his intention of acting for some one other than the ratifier.

He does not, as it seems to me, intend to decide or pronounce an uncalled-for opinion on the question that was left open in that case, as appears by the words in Godbolt, "ad hoc non fuit responsum." Speaking of the sheriff's officers, he goes on to say, "They did not assume to act as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another, namely, the sheriff, by virtue of the process directed to him by the Court." It is perhaps doubtful whether by "assume" in this passage he means more than "take upon themselves," which is the literal meaning of the word. Next comes *Bird* v. *Brown* (1), decided in 1850, also much relied on by the respondents. There again the point now raised did not come in question. The act ratified had been done in terms on behalf of the person who ratified, and the only question was whether the ratification could undo rights already acquired in the interval. Rolfe B. makes a general statement of the law of ratification both in the case of contract and of tort. So far as he deals with contracts, there is nothing to hurt the appellants' or support the respondents' case. He says simply, "If A. B., unauthorized by me, makes a contract on my behalf with J. S.," I may ratify it. He then adds a sentence already cited in the earlier part of this judgment, by which he shews

(1) 4 Ex. 786.

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that by "on my behalf" he does not mean in terms expressed, for he adds, "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, &c." Now, since he could not sue A. B. as principal, if A. B. had in terms contracted "on behalf of"—i.e., as agent only—and, as he did not believe A. B. was contracting for me, there could have been no avowal. This, therefore, seems so far to be a clear authority that an undisclosed principal on whose behalf the agent had not avowed intention to contract could nevertheless ratify. In dealing with torts, however, he uses the phrases "professing to act by my authority," and, further on, "in the name and on behalf of another," which last phrase, at all events, seems to contemplate in the case of torts actual statement of the name. I think the explanation is that his attention was not really directed to the point, and that the words are somewhat loosely used. He is certainly right in saying, as he does, that ratification may take place in such circumstances, which indeed were the actual circumstances in the case before him, but this of course falls very far short of saying that it cannot take place, if those precise conditions do not concur. *Woollen* v. *Wright* (1), decided in 1862 in the Exchequer Chamber, also cited for the respondents, merely affirms the proposition of *Wilson* v. *Tumman* (2) that the sheriff's officers do not act as agents of the execution creditor, and adds nothing to this controversy. In the same year, 1862, *Watson* v. *Swann* (3), also cited for the respondents, was decided. In that case also the facts did not raise the present question. Smith, whose act the plaintiff claimed to ratify, had effected a policy to cover risks in which he had no reason to suppose the plaintiff was interested, and had no intention whatever of contracting on his behalf. It was held therefore that the plaintiff could not claim any benefit by ratification; but again some phrases in the judgments are relied on by the respondents. Erle C.J. says in the report in the *Law Journal*: "No one can sue on a contract but the person who made it or the person who ratified what purported

(1) 1 H. & C. 554.
(2) 6 M. & G. 236.
(3) 11 C. B. (N.S.) 756; 31 L. J. (C.P.) 210.

to be a contract made by his agent"; but in the next sentence he uses a phrase which shews that after all the intention, the "contemplation" of the Roman law, is the governing consideration. He says: "A very wide extension has been given to the principle to which I have adverted of the parties to a contract, in respect of a policy of insurance, and persons who could not be named at the time, if intended to come within it, and so capable of being ascertained, have been allowed to be entitled to the benefit of the same; but they must have been such as were contemplated at the time the policy was made." This view, which seems to be in entire accord with the Roman law and the early English authorities, namely, that the right of any particular individual to ratify, in the case of contracts at all events, depends on the "intention," the "contemplation," of the agent, leaves very small place for the operation of avowal: since provided a sufficient general description be given, the particular individual who may take the benefit of the contract will depend on the unavowed intention of the agent. Indeed the agent need not even have any particular individual in his mind, since it is assumed that he could not name him. Then comes the phrase used by Willes J. which was so much pressed by the respondents. He says: "The law obviously requires that the person for whom the agent professes ['purports' in the *Law Journal*] to act must be a person capable of being ascertained at the time. It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract . . . . . In the ordinary policy the broker who effects it declares that he does so as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, &c.; and the person who sues upon it must be either the broker by whom it is effected or the person on whose behalf it was intended to be effected; no subsequently acquired interest will give a stranger a right to sue upon the policy." Here again the governing factor is made to be the intention. What the learned judge's mind is addressed to is the impossibility of introducing under general words wide enough to cover

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him some person who was really not contemplated, intended, at the time. He adds further on: "It is necessary that underwriters should know with whom they are contracting," an observation which may well be applicable to the peculiar contract of insurance, which contains in it some of that personal element which I have before referred to, but certainly not applicable to ordinary cases of purchase, such as we are now concerned with, where the law undoubtedly is that the seller need not know whether he is dealing with any one behind the buyer or not. Looking then at the nature of the case those learned judges were dealing with, the limited scope which they leave to avowal, and the supreme importance which they give to intention, even in the special contract of insurance, seem to support rather than oppose the contention of the appellants in a case where any notion that it is necessary that the seller should know who the buyer is must be eliminated from the discussion. The passage from the speech of Lord Wensleydale in *Ridgway* v. *Wharton* (1) must be read with reference to the case with which he was dealing, which was that of an agent contracting in terms for another person from whom he had no authority, and who did not, as the learned Lord considered, ratify. His words are: "If a man professing to act for another makes a contract for him and authority is afterwards given by that other," there is effectual ratification; and he adds: "If a contract is made by an agent whether by authority before given or afterwards by ratifying the contract, it equally binds the principal." Read in the light of the facts he was considering, it is obvious that these remarks have no bearing on the present question. I now come to the observations of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (2), cited by the respondents. There also the question raised had no relation to the point before us. There Emanuel, who had mortgaged a policy of life assurance to Falcke, paid a premium thereon on his own account without any authority or request from Falcke. Falcke's representative afterwards attempted to take the benefit of the policy, and the question to which Bowen L.J.'s observations were addressed was whether Emanuel under those

(1) 6 H. L. C. 238, at p. 296.
(2) 34 Ch. D. 234, at p. 250.

circumstances could recover the premium from Falcke's representative on the footing that by claiming a benefit on the policy she had ratified the payment of the premium. The premium having been in fact, as the Court held, paid by Emanuel as owner of the equity of redemption, *and not for Falcke's estate*, the present question never arose for discussion; and when Bowen L.J. says that you can only ratify an act "professedly done on your behalf in such a sense as to make you liable for it," he is distinguishing adoption of an act not done on your behalf, which is impossible, and ratification of an act which was done on your behalf, which the law permits. It is doubtful whether by the words "professedly" and "purporting," which he uses in the next sentence, he meant to deal with anything but the actual intention, which in the case before him was to pay it for Emanuel's own benefit. He says: "A man can ratify that which purports to be done for himself, but he cannot ratify that which purports to be done for somebody else." The "purporting" in the case before him was that Emanuel, being owner of the equity of redemption, paid the premium. He does not appear to have accompanied it with any statement at all, but the circumstances founded the inevitable inference that he paid it for himself and no one else. "Purporting" therefore in the last limb of the sentence cannot be intended to mean more than "assuming" or "meaning."

I have now, I think, examined all the cases relied on by the respondents except *Matheson* v. *Kilburn* (1), of which there is no report except the short note in Smith's Leading Cases, and this is the only case, so far as I know, in which the point before us was actually raised for decision. It was not, however, decided, though two very eminent judges seem to have favoured the respondents' contention, while Cockburn C.J. took the other view.

No doubt the law has been laid down repeatedly in textbooks in language copied from the various judgments in the cases which I have just examined, but I have not found the point explicitly raised and considered in any of them. There may also no doubt be other cases where language similar to that quoted has been used, but I think the passages cited are

(1) 1 Sm. L. C. 10th ed. p. 349.

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the fountain-head from which these observations are drawn. One general observation applies to them and to the text-books. They profess to deal with the circumstances under which ratification *may* take place, and name the most obvious conditions; and in similar general language they describe when it cannot, of which the most obvious instance would be where the act is professedly done for another person. Hence, the antithesis which so frequently recurs between an act "purporting" to be done for some one else, and purporting to be done for the ratifier; while the intermediate case of an act neutral in itself, and carrying no indication on whose behalf it is done, is left unconsidered. I have already pointed out that the passage in Story, § 261 a, is founded on *Wilson* v. *Tumman* (1), and Serjeant Manning's note thereon, having been added to the original after the decision of that case. *Wilson* v. *Tumman* (1) I have, I think, shewn does not justify it, and there are, I think, good grounds for supposing that the Latin words "nomine ipsius" in the rule quoted in the note were not meant to convey more than "on behalf of," or to do more than express the law of the Digest, though the commentator quoted in the note puts the literal interpretation upon them. That the learned Serjeant himself did not treat the present point as settled in English law would seem clear, since in a special note to Tindal C.J.'s citation of the case in Godbolt he calls attention to Shuttleworth's question, "What if he distrain generally not shewing his intent?" To which, "Non fuit responsum."

It seems to me, therefore, that the supposed rule is not based on any sound reason; that, though supposed to be drawn from Roman law, it finds no support in Roman law; that it is opposed to the early English authorities; that there is no actual decision where it was raised and decided against the appellants; that the dicta which are supposed to establish it were pronounced alio intuitu, and in many instances when carefully examined with their context either do not support it or involve the contrary; and that if it is to be supported at all it must be rested on grounds of convenience only, and not of principle.

(1) 6 M. & G. 236.

As to convenience, it is, no doubt, a rule of English law that a contract really made for one person cannot be adopted by another, and there may be room for violations of this rule, if it is to depend on what is passing in the mind of the person who makes the contract, who is to be bound by it. But if this be an inconvenience, it is one which the law already tolerates, in that it allows a contract for an undisclosed principal by a person who contracts as principal himself; furthermore, the case would be rare where no other evidence would be available but the statement of the agent himself. But, even if there were inconvenience, it would not equal that which would be caused by an arbitrary limitation in the case of contracts for undisclosed principals. That it is arbitrary seems to me obvious, when it is realized how far the law has admittedly gone, and where it is that, according to the contention of the respondents, it stops short. A person may contract in his own name, and yet give rights to and against a third person from whom he had prior authority, though he gave no indication whatever to the other party to the contract that such person existed. He may by a similar contract, but without prior authority, if he avows that he intends to act for some one else, give a right to ratify to a person whom he could not name if asked, provided such person is capable of being ascertained and that he answers the description of person *for whom he intended to contract*: see the passage from the judgment of Erle C.J. above cited. What substance is there then in avowal as a vital fact when the party of whom avowal is required is not obliged to know the name of the person for whom he intends to act, and the standard by which the right to ratify is to be tried is what description of person the unauthorized agent contemplated at the time of the contract? The doctrine of undisclosed principal is a substantive part of the law of agency, and the principle upon which it rests: see *Trueman* v. *Loder* (1), is as old as the doctrine of ratification itself. There is no reason, therefore, why it should be subject to an anomalous exception. On the whole, therefore, though I am sensible of the great weight due to the opinion of the two judges who

(1) 11 A. & E. at p. 595.

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formed the majority in *Matheson* v. *Kilburn* (1), as well as that of my brother A. L. Smith in this case, I cannot regard that as a decision binding this Court, though it is the only case in which the point was ever actually raised for determination. I am bound, therefore, to decide this case in accordance with what I regard to be principle and common sense.

ROMER L.J. read the following judgment:—The judgments already delivered have dealt so fully with all the cases in any way bearing on the question of law arising in this case, that it would be useless for me again to review in detail those cases. I need only say that, having considered the authorities referred to, I come to the same conclusion as Collins L.J. I think that the question is open to us for decision, and ought to be decided by us, according to principle. So far as I can ascertain, the question has not been decided in any case contrary to the view expressed by Collins L.J.; and, in my opinion, the many observations of learned and distinguished judges relied on by the respondents, when carefully considered, and, when the circumstances of the cases in which they were made are remembered, do not amount to expressions of judicial opinion which render it undesirable for us to treat the question as an open one. With the exception of what was said in *Matheson* v. *Kilburn* (1), almost all the observations were made in reference to facts which did not give rise to the question we have to decide, and were not made in contemplation of that question; and I think the reason why in those observations you find it often stated that, for his act to be capable of ratification, the agent must have "professed" or "purported" to act on behalf of, or must have acted in the name of, the principal, is because the judges wished to guard themselves against the supposition that, where in fact a person did not contract on behalf of a particular principal, he could afterwards at his own will and pleasure create or select a principal. In the case of *Matheson* v. *Kilburn* (1) the question we have to decide was treated as an open one, and was left undecided; and I certainly cannot assume that, had it fallen to be decided, Lord Cairns L.C.

(1) 1 Sm. L. C. 10th ed. p. 349.

and Brett L.J. would have decided it contrary to the view herein expressed.

I wish further to observe that the question ought not to be stated as one depending merely on what passes in the mind of the person said to be an agent at the time he contracts. Such a statement only tends to obscure the real question we have to decide. It may well be, if a person has nothing to support his contention that he contracted on behalf of a principal beyond his assertion that he had it in his mind so to contract, that he will fail to prove his contention as a matter of fact. The question of law, to deal with it fairly, may be stated as follows. Where a person makes a contract which is not under seal, or by bill of exchange, without disclosing to the person with whom he contracts that he is acting as agent, and it is proved or admitted that in fact he entered into the contract on behalf of a principal, but without authority, cannot that principal ratify the act of the agent so as to place himself in the same position he would have been in as an undisclosed principal, if he had previously authorized the agent to make the contract? That is really the question we have to decide, and it is one which in my opinion ought to be decided according to the principles of law applicable, and ought not to be treated as concluded by authority.

In order to illustrate what I have mentioned is the true question to be decided, I will give an example of a case clearly raising the point of law as stated by me. Some of the directors of a limited company discover that certain goods are for sale, and that it is of importance that the company should buy the goods at the price at which they are offered; but time presses, and the contract of purchase has to be made at once. The directors in question have no time to convene a meeting of the board, and there are other directors besides themselves. They feel no doubt that the contract is one beneficial to the company, and one sure to be duly ratified. They accordingly resolve that one of their number shall enter, and he does enter, into the contract, in his own name but on behalf of the company. The fact that he has contracted on behalf of the company is not disclosed to the vendor, but the director acknowledges in

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writing signed at the time and addressed to his co-directors that he has bought on behalf of the company. The company subsequently at a board meeting duly convened purports to ratify the director's act, and adopt the contract. After that, when the vendor discovers the facts, can he not treat the company as an undisclosed principal and liable on the contract, or must it be said that it was impossible for the company to ratify?

This being the nature of the question we have to decide, it appears to me that on principle it ought to be held that ratification is possible; and that to hold the contrary would be to establish an anomaly in the law, and moreover a useless one.

Collins L.J. has dealt fully in his judgment with the reasons why ratification should be allowed by law in such a case, and I do not intend to travel again over all the ground covered by him. I agree with him in his observations and conclusion, and will only add the following remarks:—

It is of course settled law that in a contract between A. and B., not being one under seal, or by bill of exchange, if B. had at the time authority to do so, he might contract on behalf of an undisclosed principal. It is equally clear that, if a person contracts on behalf of a principal, but without authority at the time, then as a rule the principal may subsequently ratify what has been done, and we know that at law ratification relates back, and puts the agent in the same position as he would have been in if he had originally acted with authority. It seems to me to follow that, in the case we have to consider, we ought to hold on principle that ratification should be allowed, so as to place the ratifier in the position of an undisclosed principal. To hold otherwise would certainly establish an exception to the general law of ratification. I quite agree that it does not of necessity follow, because a certain view would appear logically to be the proper deduction from previously decided cases, or from well-known principles, that that view ought to be the law. But I think that a logical inference ought not to be disregarded, an exception to a general rule ought not to be established, unless on strong grounds. In the case I am considering, I can find no sufficient reason why

ratification should not be allowed. The agent cannot complain if ratification be allowed, nor the principal. They both knew what they were doing when they assumed the positions they did. Nor is the person contracted with really injured. It makes no real difference to him whether an undisclosed principal had previously or subsequently authorized the agent. It is rather to his advantage if he discovers subsequently to the contract that there is a previously undisclosed principal at the back of the person with whom he contracted. He has his option which to sue, and, if he be sued, he has the same rights against the undisclosed principal as he had against the agent. It has been decided to be no legal hardship on him to allow the undisclosed principal to appear where the agent had been previously authorized; and it cannot be any hardship on him to allow the appearance of the undisclosed principal who has subsequently ratified the act of his previously unauthorized agent.

It is said that a difficulty may arise in proving whether a party to a contract did or did not in fact contract on behalf of another when not previously authorized, for that fact might depend simply on what was passing at the time in the mind of the party. But to this objection there are several answers. First, in most cases of ratification of the kind I am considering there would be no such difficulty of proof of intent on the part of the agent, as, for example, in cases like that of the directors of a limited company suggested above, and cases where it is clearly shewn that the agent thought he had authority at the time, but subsequently found that he was mistaken; and the mere difficulty of proof in certain cases ought not to prevent ratification as a rule being allowed, especially seeing (as already mentioned) that ratification is really not injurious to any one concerned. Secondly, as previously pointed out, the difficulty of proof in special cases is met by the consideration that, if the proof of the agent's intent be challenged, those who allege the intent must satisfactorily prove it, and it may well be, if no evidence is forthcoming beyond the agent's statement as to what he had in his mind at the time, that the intent will be held not established. And thirdly, similar difficulties of proof

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might arise in the case of an agent alleged to be acting at the time with authority on behalf of an undisclosed principal. That authority might be verbal, and the principal might be dead when the question of authority has to be proved, or he might be unwilling to give evidence, or say he did not remember, or deny the agent's statement that he had authority; and the fact whether or not the agent did really contract on behalf of the alleged principal as well as the fact of authority to do so might both be very difficult of proof, and depend as to the first fact upon his evidence as to his intention. Yet such difficulties of proof afford no ground for impeaching the established rule of law as to undisclosed principals where agents act at the time with authority. So that, even viewing the question from the mere standpoint of convenience, I can find no sufficient reason for refusing to allow the doctrine of ratification to be applied in the case we have to decide. I ought perhaps to refer to the suggestion that, because in the contract no principal is mentioned, it must be taken that there is a representation that no such principal exists. That suggestion, in my opinion, cannot be supported. Had it been well founded, the Courts would never have recognised the existence of the undisclosed principal, even in cases of his having previously given authority to the agent.

For these reasons it appears to me that the question of law falling to be decided by us ought to be decided in favour of the appellants.

In the special circumstances of this action I think we are all agreed that, if the point of law is not against the appellants, there was evidence which should have been left to the jury in support of the plaintiffs' contention that the defendant Roberts contracted on behalf of himself and his co-defendants. This being so, in my opinion there should be a new trial.

Application granted.

Solicitors for plaintiffs: *Thorowgood, Tabor & Hardcastle.*

Solicitors for defendants: *Chester, Broome & Griffiths, for Holden, Sons & Hodgson, Hull.*

E. L.

SAVOY HOTEL COMPANY *v.* LONDON COUNTY COUNCIL.

1900
Jan. 22.

Shop Hours Act, 1892 (55 & 56 *Vict.* c. 62)—*Shop*—*Public-house*—*Hotel*—*Domestic Servant.*

By the Shop Hours Act, 1892, provision is made as to the number of hours in any one week during which young persons under eighteen years of age may be employed in or about a shop, and by s. 9 "'shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses and refreshment houses of any kind."

A building which is used solely as a hotel and restaurant for the accommodation of guests, and which has no bar or counter for the sale of intoxicating liquors, and is not in the ordinary sense of the term a public-house, but which is licensed as an inn under 9 Geo. 4, c. 61, for the sale of intoxicating liquors by retail, is a "shop" within the meaning of the above Act.

A page-boy in a hotel, who sleeps on the premises, and who is principally employed as a messenger, but partly also in assisting to dust the reception-rooms, is not within the exemption in s. 10 in favour of "any person wholly employed as a domestic servant."

CASE stated by the chief metropolitan magistrate.

A summons had been issued against the appellants upon a complaint made on behalf of the respondents, charging that the appellants, during the week commencing January 15, 1899, and ending January 21, 1899, at the Savoy Hotel and Restaurant (being a shop within the meaning of the Shop Hours Act, 1892), did unlawfully employ in and about the said shop one Arthur Knight (being a young person within the meaning of the said Act) for a longer period than seventy-four hours including meal-times, whereby the appellants became liable to the penalty provided by the said Act, and, further, that the appellants at the said Savoy Hotel and Restaurant did unlawfully fail to keep exhibited the notice required by s. 4 of the said Act. The summonses were by consent heard together, and the following facts were proved or admitted.

The appellants were the owners of the Savoy Hotel and Restaurant, which was licensed to be kept as an inn for the sale of intoxicating liquors under 9 Geo. 4, c. 61, and the Acts

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amending the same. The premises were structurally adapted for use as an inn or hotel for the reception of guests and travellers desirous of staying therein, and for supplying refreshments to the public, and included a restaurant, grill-room, and dining-room, in which meals and intoxicating liquors were supplied to members of the public, whether guests staying at the hotel or not; a menu card was exhibited outside the building. There was no bar or counter for the sale of intoxicating liquors, but intoxicating liquors were sold by retail by supplying them in the restaurant, grill-room, and dining-room, and to guests in their rooms. The business of the restaurant was conducted in the same manner as that of other high-class restaurants in London, and refreshments were sold there to the public as at other restaurants. The excise licence was granted under the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 43, sub-s. 4, copies of that licence and of the justices' licence being annexed to the case.

Arthur Knight, named in the summons, was fifteen years of age, and was employed by the appellants at the Savoy Hotel as a page-boy in the general service for eighty-nine hours per week or thereabouts instead of seventy-four hours. He slept in the hotel. The first thing in the morning he assisted in dusting the reception-rooms, but he was principally employed as a messenger taking up messages to and sending off telegrams and messages for persons staying at or using the hotel and restaurant. There was no notice at the hotel such as is required by the provisions of the Shop Hours Act, 1892, to be exhibited in shops where young persons are employed.

On behalf of the appellants it was contended that, whereas the word "shop" was defined by the Shop Hours Act, 1892, to include licensed public-houses and refreshment houses of any kind, the Savoy Hotel was not a public-house nor a refreshment house within the meaning of the said statute, and that the expressions "public-house" and "refreshment house" were only intended to apply to ordinary public-houses where intoxicating liquors are sold at a bar, and to refreshment houses which are licensed for the sale of wine and beer under 23 & 24 Vict. c. 27. It was further contended that the page-boys

employed in the hotel, including Arthur Knight, were not young persons employed in a shop, but domestic servants, and thereby exempt from the operation of the Act.

On behalf of the respondents it was contended that the Savoy Hotel, or some part or parts thereof, came within the definition of the word "shop" in the Shop Hours Act, 1892, and that the page-boys, including Arthur Knight, were employed there within the meaning of that Act.

The learned magistrate was of opinion that, regard being had to the nature of the business carried on at the Savoy Hotel, it was such a licensed public-house as to fall within the definition of the word "shop" in the Act; and, further, that Arthur Knight was not wholly employed as a domestic servant within the meaning of s. 10 of the Act. He therefore convicted the appellants on both summonses.

The question for the opinion of the Court was whether on the facts stated the decision of the learned magistrate was right in law.

Avory, for the appellants. The conviction was wrong on two grounds. First, the Savoy Hotel is not a public-house or refreshment house within the meaning of the statute. The expression "public-house" is not to be construed literally and without regard to the objects of the Act. The meaning of s. 9 is that "shop" is to include "public-house" where necessary for the purposes of the Act; in other words, a place which is a shop in the ordinary sense is not to be exempt from the operation of the Act by reason of its being what is ordinarily termed a public-house. The expressions "public-house" and "refreshment house" are used in a technical sense in s. 9, and the facts stated in the case shew clearly that the Savoy Hotel is not in the technical sense of that term a public-house. If the Act had been intended to include a hotel, it would have used that term, or some equivalent expression such as "premises licensed for the sale of intoxicating liquors." Secondly, the boy was exempt as being wholly employed as a domestic servant. A page-boy is within the description of domestic servants for whom establishment licences have to be taken out;

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he differs in no respect from a waiter in a hotel, who is a domestic servant and requires a licence under the revenue laws: *Spencer* v. *Sheerman*. (1) There is nothing in the evidence to justify the magistrate's finding; the duties of the boy were those of a page-boy in a private house. The interpretation clause shews that the Act is intended to apply to places where assistants are employed, and a page-boy is not a shop assistant.

Daldy, for the respondents. The appellants were properly convicted. The Act of 1892 should have a wide construction placed upon it: *Collman* v. *Roberts*. (2) It is true that the expression "public-house" has acquired a secondary meaning which cuts it down so as not to include an inn; but its primary meaning must here be looked at. In the Century Dictionary "public-house" is defined to be "an inn or tavern; in England, especially, one which rarely accommodates lodgers, and which has for its chief business the selling of beer and other liquors." Accepting that definition, there is no indication throughout the Act that the expression is used in its secondary sense; and an inn is as much within the mischief of the Act as an ordinary public-house. There was ample evidence to justify the finding of the learned magistrate that the boy was not exclusively employed as a domestic servant. [He also cited *London and Suburban Land and Building Co.* v. *Field* (3); *Coombs* v. *Cook*. (4)]

Avory, in reply.

CHANNELL J. This case is not altogether free from difficulty, but I have come to the conclusion that the appeal should be dismissed. The object of the statute is to restrict the number of the hours of employment in shops of young persons under eighteen years of age. The employment of young persons in factories had already been provided for by statute, and the intention of the Act of 1892 was to extend similar provisions to different kinds of employment; the nature of the employments affected is to be gathered from the Act itself. The

(1) (1871) 23 L. T. (N.S.) 873.
(2) [1896] 1 Q. B. 457.
(3) (1881) 16 Ch. D. 645.
(4) (1883) Cab. & Ell. 75.

recital is not very important, but it shews that the object of the Act was to prevent the injury to the health of young persons employed in shops and warehouses caused by the length of the period of employment. After forbidding in s. 3 the employment of young persons in or about a shop for more than seventy-four hours, including meal-times, in any one week, the Act goes on in s. 9 to define the meaning of the word "shop." It commences by defining it as meaning "retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire," and this is the primary meaning that the word bears throughout the Act; the section then goes on to say, "and includes licensed public-houses and refreshment houses of any kind." The reason for legislating in this way is that the Legislature intended to bring within the Act something that otherwise would not be within it, but would nevertheless be within the mischief against which the Act was intended to provide. Neither a licensed public-house nor a refreshment house comes within the ordinary meaning of the word "shop"; but the Legislature were of opinion that there were some public-houses and refreshment houses as much within the mischief sought to be guarded against as an ordinary shop. That being so, we ought not to give any importance to the fact that the Act appears to apply to establishments which one would have thought there would be no intention to include within its scope, for the result of an interpretation clause is frequently to bring the most incongruous things within the operation of a statute. There being then some licensed public-houses and refreshment houses to which the definition of "shop" was intended to apply, because they were within the mischief of the Act, how far is that definition to be held to extend? The section in terms applies to licensed public-houses of any kind, and I think that every place of business having a public-house licence must be held to be within the Act; there is no greater hardship in making the Act apply to employment in the grandest hotel than there is in applying it to a house of an inferior description. I think, therefore, that we are bound so to interpret the Act as to make it include the Savoy Hotel. It is true that that establishment is not an ordinary public-

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house; but it has a public-house licence attached to it, and licensed public-houses of any kind are within the operation of the Act. It is entirely within the mischief of the Act, and I think that the learned chief magistrate was right in the conclusion at which he arrived. On the second point, as to whether the boy was wholly employed as a domestic servant, the learned magistrate found that he was not; I think that there was evidence on which he could so find, and that his decision cannot be disturbed. In saying this I do not desire to intimate a doubt as to the correctness of his conclusion; indeed, I think that his decision upon this point also was right, and that, if the case comes (as I have already held it does) within the Act, it does not come within the exclusion.

BUCKNILL J. I agree upon both points, and will only add, as regards the first point, that the proper way to read s. 9 is to read it as applying to licensed public-houses of any and every kind. We have no right to say that the Savoy Hotel, which, having a public-house licence, is a public-house of a kind, is not within the Act.

Appeal dismissed.

Solicitors for appellants: *Fladgate & Co.*
Solicitor for respondents: *Blaxland.*

W. J. B.

STANTON *v.* BROWN.

1900
Jan. 24.

Landlord and Tenant—Reservation of Sporting Rights—Reservation Severable as to Ground Game and Winged Game—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

Sect. 3 of the Ground Game Act, 1880, which makes void "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act," avoids them only so far as they are contrary to the provisions of the Act. Where, therefore, a lease of a farm contains a reservation to the lessor of the exclusive right of the lessor and his friends to enter upon the farm for the purpose of sporting, the reservation is severable; and, although void as to the ground game as being in contravention of the provisions of the Act, is nevertheless good as to the winged game.

SPECIAL CASE stated by justices for the county of Gloucester.

An information had been preferred by the appellant against the respondent, charging him with having committed a trespass by unlawfully entering in the daytime upon certain land in the occupation of Josiah Hook in search of game. At the hearing of the information the following facts were proved.

By a lease dated May 12, 1888, between C. H. Stanton, the landlord, and Josiah Hook, the tenant, a certain farm, land, and hereditaments were leased to Hook for seven years from Michaelmas, 1888. The lease contained a reservation to the lessor of "the exclusive right of the lessor and his friends to enter upon the said farm for the purpose of sporting or otherwise." After the expiration of the lease by effluxion of time, Hook continued to occupy the farm as tenant up to the date of the hearing of the information.

The landlord had for many years authorized his brother, the appellant, to shoot game on the farm, and this authority was from time to time acted upon. On September 2, 1899, the appellant entered on the land, with the landlord's consent, for the purpose of shooting partridges, and found the respondent also shooting partridges there. The respondent, when asked by whose authority he was there, said that the tenant (Hook) had given him permission; whereupon he was informed by the

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appellant that Hook had no authority to do so, and that he must not come there again without permission.

On September 6, 1899, the appellant again found the respondent on the land shooting partridges, and the respondent told him he had seen the tenant since their last interview, and he had again got his permission to shoot on the land. The respondent was then informed that proceedings would be taken against him; and on September 7, 1899, an information was laid against him under s. 30 of the Game Act, 1831.

At the hearing the counterpart lease was produced, and the tenant gave evidence that after the expiration of the term there had been a verbal reletting, but that no mention had been made of shooting, and that no new arrangement as to terms had been entered into either verbally or in writing. He further said that, after the expiration of the lease, he considered his tenancy to be an open one under the Agricultural Holdings Act, and that he had a joint right with the landlord of shooting all game; that he had never exercised the right himself, but had given permission to others to shoot, including the respondent, on the occasions in question.

The justices were of opinion, firstly, that the terms of the lease subsisted, as far as consistent with a tenancy from year to year; secondly, that, having regard to the decision in *Jeffryes* v. *Evans* (1), the reservation in the lease (which operated as a regrant by the tenant) was an agreement, condition, or arrangement which purported to divest or alienate the right of the tenant to kill and take ground game, and was therefore ipso jure void under s. 3 of the Ground Game Act, 1880; thirdly, that the inclusive reservation of sporting in the lease was inseverable in its terms, and that there was no authority to support the contention that it could be held to be good in part as to winged game and void in part as to ground game. Being a criminal or penal case, they were of opinion that they should construe the Act strictly, and that they could not cure any defect or rectify the reservation by the importation of any implied words that might or ought to be introduced to express the contention that ground game was excepted from the reser-

(1) (1865) 34 L. J. (C.P.) 261.

vation. Fourthly, that the parties to the lease were thrown back on their common law rights, and that by the common law the tenant had the right to kill both the winged and ground game on the land, and could lawfully authorize the respondent to do so. The justices did not consider that the assertion of right by the defendant was presented in a form that ousted their jurisdiction (1), but they dismissed the information on the points of law set forth.

The questions upon which the opinion of the Court was asked were:—

1. Has the term "sporting" a more limited interpretation since the passing of the Ground Game Act, 1880, than it had before, and does it now exclude shooting or coursing hares and rabbits?

2. Whether or not upon the questions of law the justices were right in their determination?

3. If not, what should be done or ordered by the Court?

W. L. Richards, for the appellant. The reservation of the sporting rights was applicable to the yearly tenancy which commenced on the expiration of the lease, and was clearly severable; the fact that it was void as to ground game did not avoid the reservation altogether. The effect of s. 3 of the Ground Game Act is only to avoid an agreement so far as it is contrary to the express provisions of the Act itself. There are two decisions, the analogy of which to the present case is very strong. In *Gaskell* v. *King* (2) it was held that a covenant in a lease whereby a tenant bound himself to pay the property tax and all other taxes imposed on the premises or on the landlord in respect thereof, though void and illegal by 46 Geo. 3, c. 65, s. 115, did not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c., generally, for such general words were to be understood of such taxes as the tenant might lawfully engage to pay; and in *Harrington* v. *Kloprogge* (3) an agreement for the assignment of the profits

(1) It did not appear from the case that the defence of a bonâ fide claim of right was in fact set up at all before the justices.

(2) (1809) 11 East, 165; 10 R. R. 462.

(3) (1785) 2 B. & B. 678, n; 23 R. R. 539, n.

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of all offices was held to be good as to all offices which could legally be assigned.

No one appeared on behalf of the respondent.

Cranstoun (1), as amicus curiæ, referred to *Beardmore* v. *Meakin* (2) as shewing that a reservation in a lease, which was illegal as contravening the provisions of the Ground Game Act, 1880, did not affect the validity of the rest of the instrument.

CHANNELL J. I think that this is a very clear case. Looking at the provisions of s. 3 of the Ground Game Act, 1880, it seems to me that that section cannot mean that an agreement as to game which contains something in contravention of the occupier's right to destroy ground game is to be void in its entirety, and the case of *Beardmore* v. *Meakin* (2) shews that that is not its meaning. The section cannot mean that the reservation is void in its entirety, for it applies not only to agreements made since the passing of the Act, but has also a retrospective operation as regards agreements made before that date; on that construction of the section, therefore, the Legislature would, in the case of a reservation prior to the Act, at the same time give the occupier the ground game, and also take away the reservation to the landlord of the winged game. I think that the word "void" in this section means that the agreement is to be void so far as it is contrary to the enactment. The appeal must therefore be allowed, and the case remitted to the justices.

BUCKNILL J. I agree.

Appeal allowed.

Solicitor for appellant: *A. H. G. Heelas, Stroud.*

(1) He had been instructed on behalf of the justices, but, having no locus standi in that capacity, was heard as amicus curiæ.

(2) (1885) L. J. Notes of Cases, 8.

W. J. B.

WARD & CO. *v.* WALLIS.

1900
Feb. 10.

Mistake—Money paid under Compulsion of Law—Money credited in Claim—Receipt in Full given—Want of bona fides—Action for Recovery of Money.

The plaintiffs sued the defendant for work and labour done. In the writ they by mistake credited the defendant with the payment of a sum on account and claimed the balance. The defendant knowing that they had made a mistake paid the balance and obtained from them a receipt for the whole sum due from him to them. Subsequently, having discovered their mistake, the plaintiffs brought an action to recover from the defendant the sum wrongfully credited to him, as money had and received to their use:—

Held, that, although the receipt had been given under compulsion of legal process, the defendant could not rely upon it as a defence to the action since he had not acted bonâ fide, and that the plaintiffs were therefore entitled to recover the sum claimed.

SHORT CAUSE tried before Kennedy J.

The plaintiffs were cement specialists and the defendant was a builder.

The action was brought to recover 75*l.* for work and labour done and materials supplied by the plaintiffs to the defendant, or in the alternative for money had and received by the defendant to the use of the plaintiffs.

In January, 1898, the defendant entered into a contract with a Miss Barry to erect for her a building. The contract provided that certain pavements in the building should be supplied by the plaintiffs at a cost of 125*l.* 5*s.*, and this sum was included in the bill of quantities on which the defendant tendered. The plaintiffs having done the requisite work obtained from the architect a certificate that 125*l.* 5*s.* was due to them, and applied to the defendant for payment. The defendant wrote that if he did not pay the plaintiffs the architect might do so under the contract, and might deduct the amount from the contract price, and that he had therefore directed the architect to pay the plaintiffs. The architect, however, when applied to, said that it was for the defendant to pay the plaintiffs. Ultimately on April 19, 1899, the plaintiffs

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issued a writ against the defendant in which by a mistake they credited the defendant with a payment on account of 75*l.*, and claimed the balance of 50*l.* 5*s.* The mistake arose from the receipt by the plaintiffs of a sum of 75*l.* from another person of the same name as the defendant, which receipt they wrongly credited to the defendant. On being served with the writ the defendant paid to the plaintiffs the balance of 50*l.* 5*s.*, and obtained from them a receipt shewing that the whole of the amount due to them had been paid by him to them. He forwarded the receipt to the architect and obtained from him (acting as agent for Miss Barry) payment of the balance due under the contract, including the sum of 125*l.* 5*s.* Subsequently the plaintiffs discovered their mistake and brought this action. On an application under Order XIV. the defendant in his affidavit swore that he had a good defence, because the work done by the plaintiffs had not been ordered by him or by any one on his behalf. The master gave the plaintiffs liberty to sign judgment. The defendant appealed, and it was ordered that the case should be tried as a short cause. On the case coming on for trial it was adjourned, and an opportunity was given to the defendant of giving evidence if he thought fit; but his counsel subsequently stated that he did not desire to do so.

Loehnis, for the plaintiffs.
Alan Macpherson, for the defendant.

KENNEDY J. This is a case raising a point of some nicety. The action was brought by the plaintiffs against the defendant to recover a sum of 75*l.* which is claimed for work and labour done, or in the alternative as money had and received by the defendant for the use of the plaintiffs. Application was made for judgment under Order XIV., and the defendant sets up that he has a good defence on both heads of claim for the following reasons. First, the defendant says that, in so far as regards the claim for work and labour done, that work was never ordered by him, but that if the plaintiffs had any claim against him that claim has in effect been settled in a way which precludes the plaintiffs from successfully bringing the present

action; and, secondly, in so far as regards the claim for money had and received, the defendant says that he has a good defence because, in regard to the sum of 75*l.* wrongly credited to him by the plaintiffs, the settlement bars a recovery under this form of claim, as well as the claim for work and labour done; and, as regards the money subsequently received under the architect's certificate, because there was no receipt of any part of this money by him to the use of the plaintiffs. [The learned judge then stated the facts, and continued:—]

It is difficult to understand the justification of the position of the defendant. He has not thought fit to avail himself of the opportunity which I gave him of going into the witness-box, and it is therefore impossible not to draw the conclusion that he knew, when he was served with the writ in the first action and when he settled the claim under it, that he was being wrongly and in error credited with the payment on account of 75*l.* which appeared in the indorsement on the writ.

It cannot, as it seems to me, be denied that if he had acted conscientiously he ought, when he received the sum of 125*l.* 5*s.* from the architect, to have paid over to the plaintiffs the balance now sued for, or to have at once returned 75*l.* of that sum. However, he has not done so; he is entitled to stand on his legal rights, and if he has a legal defence to this action I am bound to give effect to it.

The point seems to me by no means free from difficulty. There has been a settlement under legal process, and in the terms in which, and for the amount of which, payment was demanded in that legal process. It is plain from *Marriot* v. *Hampton* (1) and the cases such as *Hamlet* v. *Richardson* (2) cited in the notes to that case in Smith's Leading Cases, that as a general rule where money has been paid under the compulsion of legal process it cannot afterwards be recovered back, although the defendant finds that he has paid in error what he was not legally bound to pay. No doubt *Marriot* v. *Hampton* (1 and *Hamlet* v. *Richardson* (2) were the converse of the present

(1) (1797) 7 T. R. 269; 2 Sm. L. C. 10th ed. 409; 4 R. R. 439.

(2) (1833) 9 Bing. 644; 35 R. R. 650.

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Kennedy J.

case, for here it is the plaintiffs who are reopening the transaction; but the principle seems to me to apply that after a settlement under the pressure of process of law the proceedings cannot in general be reopened. In *Moore* v. *Vestry of Fulham* (1) an attempt was made to shew that the principle on which *Marriot* v. *Hampton* (2) and the cases following it were decided was that of res judicata; it was held that that was not so, but, as I understand the effect of the judgment, that the principle on which those decisions rest is that it would be against public policy to allow a matter to be reopened after the law had been called in to effect a settlement and a payment had been made under the pressure of the law. It seems to me that, just as a defendant who has by mistake and without legal liability paid a sum of money under the pressure of legal process cannot, as a general rule, recover it back from the plaintiff, so neither in general can a plaintiff who has given the defendant in an action credit for a sum on account and been paid after writ be allowed to reopen the matter either by suing afresh upon the same cause of action, or by suing for the amount for which he wrongly gave credit as money had and received to his use.

I am of opinion, therefore, that the plaintiffs here cannot recover the 75*l.* they claim, either as due for work and labour done or as money had and received to their use, unless there are some special circumstances which would prevent the general principle enunciated in those authorities from applying.

It seems to me to appear from the notes to *Marriot* v. *Hampton* (2) that there must be bona fides on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case into force, and that if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriot* v. *Hampton* (2) may not prevent the defendant from recovering the money back. A similar limitation, as it seems to me, ought to apply to such a converse case

(1) [1895] 1 Q. B. 399.

(2) 7 T. R. 269; 2 Sm. L. C. 10th ed. 409: 4 R. R. 439.

as this, where the plaintiff in an action has on the face of the writ credited the defendant with the payment of a sum of money on account which the defendant must have known to have been so credited by a mistake on the plaintiffs' part. Now, as I have said, it is perfectly plain to my mind that the defendant in the present action was aware when he received the writ in the former action, and when he settled the claim by payment, that the sum of 75*l.* with which he was credited, as paid by him on account to the plaintiffs, had never been paid by him at all. He has not thought fit to come here and deny that he knew it; and, in my opinion, he did know it, and he was acting unconscientiously in taking the receipt from the plaintiffs in full. I think, therefore, that the settlement under legal process was not bonâ fide on his part, and that the plaintiffs are entitled to reopen it.

But then it is said that the plaintiffs cannot recover this sum as money had and received to their use because it was only credited by them to the defendant, and was never actually paid into his hands. That, I think, is not material. It is well settled that an allowance in account is equivalent to a payment, and I think, therefore, that as there was here an allowance in account made by the plaintiffs to the defendant under a mistake of fact which was known to the defendant, and of which he unfairly took advantage, the plaintiffs are entitled to recover the amount of that account from the defendant as money had and received by him to their use.

It was further argued for the plaintiffs that as soon as the architect had paid on behalf of Miss Barry the whole of the plaintiffs' bill to the defendant the 75*l.* became money had and received by him to the plaintiffs' use. That point is not material in the view I have taken of the case. I do not, however, agree with that contention. The money was not received by the defendant to hand over to the plaintiffs. He claimed it for himself on the ground that he had paid the plaintiffs their account. If he had been sued by Miss Barry for the 75*l.* I think he would have had no defence; but I do not think that the money he received from her, through the architect, was money had and received to the use of the

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plaintiffs, or that his receipt of the money gives the plaintiffs any better right of action.

It seems to me that the ground on which they are entitled to recover is that the settlement under legal process was obtained by the defendant without bona fides, and may, therefore, be set aside.

I, therefore, give judgment for the plaintiffs for 75*l.* and costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Crump, Sprott & Co.*
Solicitor for defendant: *Alexander Pope.*

A. P. P. K.

1900
Feb. 16.

UPPERTON *v.* RIDLEY AND ANOTHER.

Police—Pension—Special-duty Allowance—"Annual Pay"—Police Act, 1890 (53 & 54 *Vict. c.* 45), *Sched. I., Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years approved service is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A constable was appointed by the commissioners of police to attend permanently on special duty at the House of Lords. For that special duty, which he discharged for several years up to the time of his retirement, he received the sum of 1*s.* a day in addition to his ordinary pay:—

Held, by Channell J. (Bucknill J. dissenting), that the extra remuneration for the special duty formed no part of his "pay" for the purposes of the calculation of his pension:

Held, further, by Channell and Bucknill JJ., that for the purposes of calculating pension "annual pay" means three hundred and sixty-five times the amount of the daily pay, not fifty-two times the amount of the weekly pay.

CASE stated by the quarter sessions for the county of London on an appeal by a police constable under s. 11 of the Police Act, 1890. The respondents were Sir Matthew White Ridley, as being the police authority of the metropolitan police district, and Sir Edward Bradford, as being the commissioner of police of the metropolis.

1. The appellant joined the metropolitan police force on December 30, 1872, and on January 1, 1899, he had completed not less than twenty-five years' approved service as a police constable. He had previously duly signed an acceptance of the provisions of the Police Act, 1890. He had given all requisite notices of his desire to retire and to receive a pension, and he was entitled as of right by the Police Act, 1890 (1), to

(1) By the Police Act, 1890, s. 1, "Subject to the provisions of this Act every constable in a police force

"(*a*) If he has completed not less than twenty-five years' approved service . . . . shall . . . . be entitled without a medical certificate to retire and receive a pension for life."

Sect. 3: "(1.) The pensions . . . . shall be in accordance with the pension scale for the force.

"(2.) The pension scale for a police force shall be (*a*), as regards ordinary pensions, a fixed scale adopted by the police authority within the maximum and minimum limits set forth in Part I. of the First Schedule to this Act."

By s. 11, "In any of the following cases—

"(*b*)—where a constable . . . . claims a pension . . . . under this Act as of right and the police authority do not admit the claim,

the constable . . . . may apply to the police authority for a reconsideration of the claim to the pension . . . . and if aggrieved by the decision upon such reconsideration may apply to the next practicable court of quarter sessions . . . . and that Court after inquiry into the case may make such order in the matter as appears to the Court just, which order shall be final."

Sect. 15: "The police authority of every police force shall deduct from the pay of every constable in the force—

"(*a*) Sums at a rate not exceeding two and a half per cent. per annum on his pay."

Sect. 16: "(1.) There shall be a pension fund of every police force, and there shall be carried to that fund—

"(*a*) The deductions . . . . made in pursuance of this Act from the pay of the constables in the force."

Sect. 32: "This Act shall apply to the metropolitan police force, subject as follows:—"

"(5.) The rate and conditions of pension of the chief commissioner of metropolitan police and of the assistant commissioners of metropolitan police shall be regulated by the provisions of this Act and not by the provisions of the Metropolitan Police Staff (Superannuation) Act, 1875, but the said chief commissioner and assistant commissioners shall be entitled to pension under the provisions of this Act in respect of any emoluments in respect of which they are entitled to a superannuation allowance made under the Metropolitan Police Staff (Superannuation) Act, 1875."

Sched. I., Part I., "Ordinary Pensions": "(1.) The pension to a constable on retirement shall be within the maximum and minimum limits following; that is to say—"

"(*c*) If he has completed twenty-five years' approved service an annual sum not less than thirty-sixtieths nor more than thirty-one-fiftieths of his annual pay, with an addition of not

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retire and receive a pension for life of two-thirds of his annual pay at the date of his retirement.

2. On March 11, 1894, the appellant, having already served for nine years as a police constable at the Houses of Parliament, was selected by the commissioners of police for permanent duty at the House of Lords, and continued to serve in that capacity until January 2, 1899, the date of his retirement.

3. The duties which the appellant had to perform at the House of Lords were to preserve the peace, to keep order, to protect the person and property of the High Court of Parliament and of persons resorting thereto, to attend fire drill, and generally to act as a police constable in pursuance of his oath and under the orders of the commissioners.

4. From March 11, 1894, down to January 2, 1899, the appellant was paid every week the sum of 39*s.*, which was made up as follows: 32*s.*, being the ordinary pay of a constable of his rank and service, and an additional sum of 7*s.* in respect of the special duty upon which he was employed. Some constables attend at the Houses of Parliament on special duty during the session of Parliament only; but all constables attending there, whether permanently or for the session only, equally receive a special duty allowance of 1*s.* a day.

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less than one-sixtieth nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so however that the pension shall not exceed two-thirds of his annual pay."

The pension scale adopted for the metropolitan police force is the maximum limit allowed by the above schedule.

By Sched. I., Part III., rule 11, "In estimating any pension . . . . for the purposes of this Act, (*a*) a pension . . . . to a constable shall be calculated according to the amount of his annual pay at the date of his retirement."

By s. 1 of the Metropolitan Police Staff (Superannuation) Act, 1875 (38 & 39 Vict. c. 28), power was given to the Secretary of State to make regulations respecting the grant of superannuation allowances to all officers of the metropolitan police force other than constables.

By an order made by the Secretary of State under that power, it was provided that the superannuation allowance to be granted to any person under the order, "whether the remuneration be computed by day pay, weekly wages, or annual salary," should be an annual allowance of a certain number of sixtieths of the "annual salary and emoluments of his office" according to the number of his years of service.

5. It was stated in evidence by Mr. C. L. Bathurst, chief clerk to the commissioners of police, that the commissioners were under no obligation to pay the appellant the additional sum of 7*s.* even while he remained on special service, though that is done partly as a recognition of the good conduct for which a constable is placed on special service, and partly because by being withdrawn from ordinary duty he loses to some extent his chance of promotion. Although the entire cost of the police employed on special service is paid out of moneys provided by Parliament in each year, and in calculating the amount so provided an allowance of 7*s.* is made over and above the ordinary pay of a constable, the commissioners might, in the opinion of Mr. Bathurst, instead of handing it over to the constables employed, order it to be paid into the pension fund under s. 16, sub-s. 3, of the Police Act, 1890; but of this the court of quarter sessions had no evidence one way or the other.

6. From the said sum of 32*s.* the sum of 7*d.* was deducted as a contribution towards the pension fund in accordance with s. 15 of the Police Act, 1890. The sum of 7*s.* was paid without any deduction for pension being made therefrom. The appellant signed the weekly pay-list, which contained one column headed "Amount of Pay," and another column headed "Allowance for Special Duties." The sum of 32*s.* appears therein in the former column, and the sum of 7*s.* in the latter, along with allowances in lieu of coals and in lieu of boots.

7. By s. 15 of the Police Act, 1890, the police authority of every police force is authorized and directed to deduct from the pay of every constable such stoppage during sickness as may be provided by the regulations respecting the force. In the metropolitan police force during absence owing to sickness 1*s.* per diem is usually stopped from the ordinary pay of a constable, and in the case of a constable employed as the appellant was on special duty, and receiving a special allowance in respect thereof, that allowance is usually stopped in addition to the stoppage of 1*s.* per diem from his ordinary pay. During the period of his absence the amount of the said allowance would be paid to the constable who actually performed the special duty.

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8. A good-service allowance of 25*l.* per annum is granted to each of the eight senior superintendents of the metropolitan police force, and this allowance is taken into account in the calculation of pension.

9. Upon the appellant's retirement the respondents awarded him a pension of 55*l.* 9*s.* 4*d.* a year, which is at the rate of fifty-two times the sum of 1*l.* 1*s.* 4*d.*, the said sum of 1*l.* 1*s.* 4*d.* being two-thirds of the above-mentioned sum of 1*l.* 12*s.*

10. Upon behalf of the appellant it was contended—

(*a*) That he was entitled to receive a pension at the rate of two-thirds of the sum of 1*l.* 19*s.* per week, and that the sum of 7*s.*, which was expressly voted by Parliament as a special-duty allowance and had been paid to the appellant for a period of nearly five years, was "pay" within the meaning of Sched. I., Part I., of the Police Act, 1890, and that the purpose of that Act would be defeated if a police authority could treat as non-pensionable a special-duty allowance attached to a permanent appointment.

(*b*) That the appellant's "annual pay" within the meaning of the said Act did not mean fifty-two times his weekly pay, but three hundred and sixty-five times his daily pay. In support of the latter contention a return to Parliament signed by the commissioners of the metropolitan police was put in, which comprised a statement of the "salaries on pay per annum" of each class of the metropolitan police force, including constables paid weekly, and in which the "salaries on pay per annum" were calculated at fifty-two times the weekly pay plus one day's pay. The special-duty allowances of the police employed on special duty at the House of Lords were similarly calculated in the estimate of the money voted by Parliament.

11. Upon behalf of the respondents it was contended—

(*a*) That the appellant was only entitled to a pension at the rate of two-thirds of 1*l.* 12*s.* a week, and that the sum of 7*s.* was not part of his pay as a constable, but was only an allowance in the nature of a gratuity, and that the said sum of 7*s.* was properly not taken into account in arriving at the pension due to the appellant.

(*b*) That as the appellant was paid weekly, his "annual pay"

meant fifty-two times his weekly pay and no more. And it was admitted that it had always been the practice to compute constables' pensions on that basis.

The court of quarter sessions dismissed the appeal subject to a case for the opinion of the High Court.

The questions for the opinion of the Court were :—

1. Whether the sum of 7*s.*, though called an allowance, was "pay" within the meaning of the Police Act, 1890, and as such ought to have been taken into consideration in arriving at the amount of the pension due to the appellant.

2. Whether "annual pay" means fifty-two times the weekly pay, or three hundred and sixty-five times the daily pay.

Pickersgill, for the appellant. The Police Act, 1890, for the first time gives to a constable on his retirement from the force, subject to certain conditions, a right to a pension, which pension is, by the terms of Sched. I., rules 1, 11, to be calculated on his "annual pay" at the date of his retirement. The special allowance of 7*s.* a week was part of the appellant's pay. The object of the Act would be defeated if the police authority were entitled to exclude from the calculation something which really was "pay" by the mere device of calling it by another name. In the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), the term "pay" was apparently used to include allowances. For, after providing in s. 9 that a return should annually be laid before Parliament of the number of men in each class of the force with the "salaries and allowances" enjoyed by each class, in the section dealing with the creation of a superannuation fund (s. 22), it provided that for the purposes of that fund certain sums should "be deducted from the pay of every constable." The word "pay" was there used as a generic term to include both the salaries and allowances mentioned in s. 9.

It may be that, as the case finds, no deductions were made from the 7*s.* under s. 15 of the Act of 1890 for the purposes of the pension fund. But that was the fault of the police authority, and the appellant ought not to be prejudiced by their omission. Moreover, machinery is provided for the rectification

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of that omission by s. 30, sub-s. 10. In *Reg.* v. *Postmaster-General* (1) it was held that the "emoluments," upon which compensation to an officer of a telegraph company for loss of his office was to be computed under the Telegraph Act, 1868, included not merely his salary, but also the difference between his travelling allowances and what it would have cost him to live at home during the period of his absence. That case is in the appellant's favour. The special allowance of 7*s.* is given to compensate for loss of increase of salary and of promotion. If the appellant's pay had been increased in the ordinary course, or if he had been promoted, he would have been entitled to an increased pension, and he ought not to be placed in a different position by reason of his having accepted the special duty with its attendant allowance.

As to the second question, there can be no ground for treating the year as containing only three hundred and sixty-four days.

Macmorran, Q.C., and *J. P. Grain*, for the commissioners of police. It is a matter of doubt whether there is any power in the quarter sessions to state a case, for s. 11 of the Act of 1890, under which the appeal is brought, says that the order of the quarter sessions shall be final; but the commissioners do not desire to raise the point. The weekly sum of 7*s.* was no part of the appellant's pay. In all the old Superannuation Acts a distinction is drawn between salary or pay and emoluments. Thus, by 22 Vict. c. 26, s. 2, civil servants are to have their pensions computed on the "annual salary and emoluments" of their office. And this distinction is continued in the Police Act, 1890, for by s. 32, sub-s. 5, the commissioners of police are entitled to pension, not only on their pay, but also "in respect of any emoluments" in respect of which they were, at the time of the passing of the Act, entitled to a superannuation allowance. The fact that emoluments are mentioned in the case of the commissioners and not in that of constables shews that it was not intended to make emoluments part of the basis of pension in the case of the latter. In the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), the same dis-

(1) (1878) 3 Q. B. D. 428.

tinction is drawn, and it is expressly provided that the superannuation allowance of a poor law officer shall be computed on the amount of his "salary or wages and emoluments." In that Act the term "emoluments" is defined to include the "money value of apartments, rations, or other allowances in kind." The 7*s.* was in the nature of an emolument. Constables, as appears from the pay-list, are made pecuniary allowances in lieu of coals and boots, as well as in respect of special duty; but it could not be said that an allowance for coals or boots was part of the man's pay. The appellant, having for years allowed the 7*s.* to be paid to him without deduction, is estopped from saying that it is part of his "pay," for all pay is subject to deduction. The form of the pay-list, which contains different columns for "pay" and for "allowances," and which was signed every week by the appellant, shews that neither the commissioners nor the appellant treated this 7*s.* as part of the pay.

As to the second question, it has been the invariable practice to compute constables' pensions on fifty-two weeks' pay only. That is also the practice which obtains in the case of domestic servants.

Pickersgill, in reply.

CHANNELL J. The first question submitted to us is one which has given us considerable difficulty, and upon which my brother and I are not wholly agreed. The question turns upon the construction of the Police Act, 1890, which for the first time entitled police constables in certain cases to a pension as of right. The Act does not itself define the amount of the pension to which a constable of a certain number of years' service shall be entitled, but it is to be according to a fixed scale adopted by the police authority within the maximum and minimum limits set forth in Sched. I. It is conceded that in the metropolitan police district the Secretary of State, as the police authority, has adopted as the pension scale the maximum limit set forth in the schedule, and it is found in the case that the appellant has served a sufficient number of years' approved service to entitle him to a pension of "two-thirds of his annual

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pay." The question, then, which we have to decide is, what is meant by those words, "annual pay"? They would, in their widest signification, I suppose, include any pecuniary remuneration for services, and consequently the sums with which we have here to deal would primâ facie come within the ordinary meaning of the word "pay." But the question is whether they come within the meaning of the word as used in the Act. The term "pay" is no doubt nowhere defined in the Act. But there seems to have been a distinction drawn in earlier Acts dealing with the subject of superannuation between salary or pay on the one hand and emoluments or special allowances on the other, and that distinction seems to have been well understood and recognised in a long course of practice between the police constables and the authority that paid them. And it must be taken that the Legislature when passing the Act of 1890 used the term "pay" with reference to that distinction. And this view is supported by the fact that in s. 32 it is provided that the commissioners of metropolitan police, who, before the passing of the Act, were entitled under the Metropolitan Police Staff (Superannuation) Act, 1875, to have their pensions calculated upon the "annual salary and emoluments" of their office, should "be entitled to pension under the provisions of this Act in respect of any emoluments" in respect of which they were entitled to a superannuation allowance under the Act of 1875, a provision which would have been superfluous if emoluments were already included under the term "pay."

In this particular case the question arises as to the pay of a constable attending on duty at the House of Lords. Of constables attending at the House of Lords there are two classes: some attend there all the year round, and others only during the session. Both classes receive in respect of their attendance an extra payment of 1*s*. per day so long as they attend. This sum is paid to them weekly, but in the weekly pay-sheet, which they have to sign, it is entered, not in the column headed "Amount of Pay," but in the column headed "Allowance for Special Duties," and is there classed with allowances for such things as uniforms, coals, or boots. This seems to shew that

this special sum for attendance at the House is given to and received by them, not in the character of pay, but in the character of an allowance. In the case of the constables who only attend temporarily during the session such sums, even if they could be called pay, clearly could not be called annual pay, and in their case, therefore, I should have no difficulty whatever in saying that the special allowance in respect of their special duty could not be taken into consideration in computing the amount of their pension. And I also think it clear that, in the case of constables not permanently appointed to attend at the House, the mere accident that they had in fact attended for upwards of a year would not better their position, and that the special allowance in their case also could not be regarded as pay. But the difficulty in the present case is that we have to deal with the case of a constable who has not merely in fact served by the year, but has been specially appointed so to serve; for the case finds that after the appellant had already served nine years as a police constable at the House of Parliament he was selected by the commissioners of police for permanent duty at the House of Lords. I do not suppose he was in any sense guaranteed the permanence of his position, but he was given to understand that so long as he conducted himself properly he would continue to be employed in that capacity and would receive the extra 1*s.* a day. I have, however, although with considerable doubt, arrived at the conclusion that the permanence of the employment makes no difference in the character in which this extra sum is paid to him. I think it is none the less an allowance, and cannot be treated as annual pay for the purposes of calculating his pension.

Then we come to the second question as to the odd day over and above the fifty-two weeks. According to the schedule, the pension is to be calculated upon his annual pay. But what is his annual pay? Strictly speaking he has no annual pay, for the contract is not to pay him by the year at all. He is paid weekly. The words "annual pay," therefore, can only mean the sum which he receives for his services during the year. The amount of the annual pay cannot depend upon the number of pay-days in the year, for if it did there would in some years

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be fifty-three pay-days, the pay-day being always the same day of the week, and if the year immediately preceding his retirement were one of those years it could not be said that the pension should be calculated as fifty-three times the weekly pay. It follows that it must be calculated on the pay for fifty-two weeks and one day, and the existing practice of calculating it on fifty-two weeks' pay only is wrong. So far, then, as the second question is concerned, the appeal must be allowed.

BUCKNILL J. With regard to the second question, I entirely agree with what has been said by my brother Channell. But on the first question I take a different view. The appellant was in 1894 selected by the commissioners of police for permanent duty at the House of Lords, and I think we may take it that as between the commissioners and the appellant it was understood that he was permanently appointed to serve there from year to year as long as he continued in the force. Having been so appointed, he remained on that special duty for a period of five years, during which time he received the sum, neither more nor less, which had been allocated to him by Parliament for his services, including the 7*s.* a week which is the subject of this appeal. Under those circumstances I cannot help thinking that that weekly sum of 7*s.* formed part of his pay for the purposes of the calculation of his pension. It has been argued against the appellant that the authorities in drawing up the pay-sheet always entered the 7*s.* in the "allowances" column and not in the column of "amount of pay," and that he always signed the pay-sheet in that form. But, in my opinion, that argument ought not to weigh with us. One can well understand how a document of this kind, when submitted to a man by his superior officers for signature, comes to be signed, and I think it would be wrong to say that because he has signed it the money received by him, namely, the 1*l.* 12*s.* ordinary wage and the 7*s.* extraordinary wage, did not constitute at the end of the year his annual pay. I cannot help thinking that if Parliament had meant to exclude such a payment as this permanent payment of 1*s.* a day for permanent

services from the category of pay it would probably have taken care to say so.

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Order of quarter sessions varied.

Solicitors for appellant: *Mann & Crump.*
Solicitors for respondents: *Wontner & Sons.*

J. F. C.

MILLER *v.* BORNER & CO.

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Feb. 16.

Charterparty—Construction of—Contract to load a "Cargo of say about 2800 Tons."

By a contract of charterparty the charterer undertook to load "a cargo of ore, say about 2800 tons." The actual capacity of the ship was 2880 tons. The charterer loaded 2840 tons:—

Held, that he had satisfied his contract.

Morris v. *Levison*, (1876) 1 C. P. D. 155, distinguished.

APPEAL from the Mayor's Court.

By a contract of charterparty made between the plaintiffs, shipowners, and the defendants, charterers, the plaintiffs contracted to load "a cargo of ore, say about 2800 tons." The defendants loaded 2840 tons. The capacity of the ship was 2880 tons. The plaintiffs brought this action to recover damages for failure by the defendants to load the stipulated amount. The judge at the trial ruled, upon the authority of *Morris* v. *Levison* (1), that the defendants, in order to satisfy their contract to load a cargo, were bound to load 3 per cent. in excess of the 2800 tons, the ship being capable of holding that amount. Judgment was entered for the plaintiffs. The defendants appealed.

Laing, *Q.C.*, and *Balloch*, for the defendants. The judge misapprehended the decision in *Morris* v. *Levison*. (1) There the contract was to load "a full and complete cargo of say about 1100 tons." And the decision turned upon the necessity of giving effect to the obligation to load a full and complete cargo, so far as was consistent with the stipulation that it

(1) 1 C. P. D. 155.

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should be of about 1100 tons. The Court there held that in order to satisfy that obligation the charterer was bound to load 3 per cent. more than the 1100 tons, the actual capacity of the ship being 1210 tons. Here the contract is only to load a "cargo," not a "full and complete cargo." The charterparty was drawn in this form for the express purpose of meeting that decision. Here the charterers would satisfy their contract by loading the stipulated amount of 2800 tons, or 3 per cent. more or less.

Bateson, for the plaintiffs. It is not enough for the charterers merely to load "about 2800 tons." Effect must be given to the word "cargo," and a cargo is what the ship will carry. There is no distinction between a cargo and a full and complete cargo. *Morris* v. *Levison* (1) is in point.

CHANNELL J. I am of opinion that this appeal must be allowed. The contract here was to ship "a cargo of ore, say about 2800 tons." The question is whether that contract differs from the contract in *Morris* v. *Levison*. (1) The decision in that case proceeded entirely upon the fact that the contractor was to load "a full and complete cargo." It was held necessary to give effect to all the words of the contract, and to put a construction on the words "say about 1100 tons," which should, so far as possible, be consistent with the meaning to be put on the words "full and complete cargo," the carrying capacity of the vessel being much larger than anything which could be considered to be about the quantity specified. Under those circumstances the Court held that the charterer was bound to ship the maximum amount which could be fairly described as "about 1100 tons," and, being empowered to draw inferences of fact, they estimated that maximum amount at 3 per cent. in excess of the stipulated quantity, namely, 1133 tons. But here the contract is only to load a "cargo" of about 2800 tons, not a "full and complete cargo" of about that amount. What, then, is a cargo? That is a question of fact. A very small quantity of goods in proportion to the carrying capacity of the ship could not be called a cargo. It must, to

(1) 1 C. P. D. 155.

some extent, approach the carrying capacity. Before, however, the question can be left to the jury whether the quantity loaded amounted to a cargo or not, the facts must be such as to render it not unreasonable for the jury to answer it either way. Here the carrying capacity was 2880 tons, and the quantity shipped was 2840 tons. That was very nearly a full and complete cargo, and consequently it would be unreasonable for a jury to find that it did not amount to a cargo at all. There was, therefore, no question to be left to the jury at all, for it could not be disputed that if the amount shipped was a cargo, it was at least a cargo of about 2800 tons. The judge, therefore, ought to have entered judgment for the defendants.

BUCKNILL J. I am of the same opinion. In *Morris* v. *Levison* (1) it was said that where the contract is to load a "full and complete cargo of say about so many tons," if the ship will in fact hold more than the specified quantity, it becomes a question for the jury what is meant by the word "about." But where, as here, the contract is only to load a "cargo of about so many tons," if the quantity loaded is capable of being described as a cargo, and equals or exceeds the quantity specified, there is no question at all to leave to the jury, it being clear that the charterer has done all that he is required to do. The appeal must be allowed.

Appeal allowed.

Solicitors for defendants: *Ince, Colt & Ince.*
Solicitors for plaintiffs: *Holman, Birdwood & Co.*

(1) 1 C. P. D. 155.

J. F. C.

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[IN THE COURT OF APPEAL.]

SMITH *v.* BUTLER.

Vendor and Purchaser—Lease of Public-house—Contract for Sale—Condition to be performed by Vendor—Time during which Condition may be performed—Absence of Express Stipulation—Date of Completion.

The plaintiff agreed to purchase from the defendant the lease of a public-house on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount of money remaining on mortgage as was then due. A date was fixed for completion and a deposit paid, which was to be forfeited if the sale went off through the default of the plaintiff. At an interview between the plaintiff, the defendant, and the mortgagee, the latter would only agree to a lesser amount remaining on mortgage. The plaintiff thereupon treated the contract as at an end. Subsequently, and before the date fixed for completion, the defendant obtained the consent of the mortgagee to the full amount of the mortgage debt remaining on mortgage, but the plaintiff refused to proceed with the purchase. In an action to recover the deposit:—

Held, that, in the absence of circumstances which would justify the plaintiff in treating the refusal of the mortgagee as final, or of an agreement express or implied that it should be so treated, the defendant had until the date fixed for the completion of the contract in which to perform the condition by obtaining the consent of the mortgagee; that the contract had therefore gone off through the default of the plaintiff; and that he could not recover the deposit.

Appeal from the judgment of Bucknill J. at the trial of the cause without a jury.

The defendant was lessee for a term of years of a public-house. The lessor, who was the owner, had lent the defendant a sum of 900*l.* upon mortgage of the house, the money being payable on demand, and there being an understanding that the loan should be diminished by an annual payment of 50*l.* Only one such payment had been made, so that the loan stood at 850*l.* On September 10, 1898, the plaintiff entered into a contract with the defendant whereby, for a certain sum of money, the defendant agreed to assign to the plaintiff the lease of the public-house and all the defendant's interest therein for the residue of the unexpired term, and November 10, 1898,

was fixed as the date for the completion of the purchase; 100*l.* was paid by the plaintiff as a deposit, and the agreement contained a provision that in case of default by the purchaser the deposit money should be forfeited, and also a clause stating that the agreement was entered into on the condition that the mortgagee would consent to the transfer of the existing loan of 850*l.* to the plaintiff. On October 4 the plaintiff, the defendant, and a broker acting for both parties, had an interview with the mortgagee, at which the latter refused to allow more than 700*l.* to remain on mortgage. The plaintiff thereupon said that the contract with the defendant was at an end. Later in the day the broker again saw the mortgagee, who, after some discussion, agreed to transfer the loan of 850*l.* upon the existing conditions, including the understanding that it should be reduced by payment of 50*l.* a year. The plaintiff was informed of this, but he adhered to his view that the contract had come to an end, and on November 11 he brought this action to recover the deposit.

The learned judge gave judgment for the plaintiff.

The defendant appealed.

Bray, *Q.C.*, and *C. L. Attenborough*, for the defendant. The agreement does not in terms fix a time within which the defendant is to obtain the consent of the mortgagee to the transfer of the mortgage debt. The defendant, therefore, had until the date fixed for the completion of the contract in which he could perform the condition, or at any rate he had a reasonable time. The plaintiff throughout treated the contract as at an end, and the sale went off by his default, and he cannot recover the deposit.

Blake Odgers, *Q.C.*, and *F. O. Robinson*, for the plaintiff. The mortgagee never consented to the transfer of the mortgage debt without condition, for he required that it should be repaid by annual instalments. Further, the time during which his consent could be obtained did not extend till the date for completion, but was at the most a reasonable time from the date of the contract. That reasonable time was fixed by the parties by their endeavour on October 4 to obtain the consent.

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On the absolute refusal of the mortgagee at the interview on that day the plaintiff was entitled to treat the contract as at an end: *Davis* v. *Nisbett*. (1) He could not be expected to wait longer to see if the defendant could perform the condition, and it would not be reasonable to require him to incur all the expense of investigating the title and to provide the purchase-money unless he was assured some time before the date for completion that the expense would not be thrown away.

The defendant never performed the condition, and therefore he cannot say that the plaintiff was not ready and willing to complete.

[They cited *Weston* v. *Savage* (2), *Forrer* v. *Nash* (3), and *Lloyd* v. *Crispe*. (4)]

A. L. SMITH L.J. This is an appeal from a decision of my brother Bucknill, and in my opinion his judgment cannot be supported. The facts are that a public-house was leased to the defendant Butler for a term of years. The owner of the house, the lessor, had lent to the defendant 900*l*. upon mortgage, the money being payable on demand, and there being an undertaking that the loan should be reduced by an annual payment of 50*l*. Only one sum of 50*l*. was in fact paid off, so that the amount remaining on mortgage was 850*l*. The defendant was desirous of selling his lease, and the plaintiff of purchasing it, provided the lessor would allow the amount then due on the mortgage to remain standing, so that the plaintiff need not find ready money to that extent. An agreement was accordingly made between the plaintiff and the defendant for the sale, which was to be completed on November 10 following. The plaintiff on signing the contract was to pay 100*l*., and in case of a default due to the plaintiff's action the deposit was to be forfeited. The contract was subject to the condition that the lessor would transfer the loan to the plaintiff. It seems to me to be clear that if it turned out that the lessor was willing, through the defendant, to transfer the loan to the plaintiff, the defendant had until November 10—the day of completion—in

(1) (1861) 10 C. B. (N.S.) 752.
(2) (1879) 10 Ch. D. 736.
(3) (1865) 35 Beav. 167.
(4) (1813) 5 Taunt. 249.

which to procure the consent of the lessor. On October 4 the parties and a broker went to the lessor, who undoubtedly when asked as to the transfer of the loan said he would only consent to the sum of 700*l.* remaining on mortgage. The plaintiff then and there said that he would have nothing more to do with the purchase, and that the contract was off. The lessor, apparently on the same day, at the further request of the defendant, agreed to the larger sum remaining on mortgage provided the existing condition as to the payment off of 50*l.* per annum remained. As to this condition, I may say in passing that the mortgage which it was proposed to transfer was payable on demand, so that the mortgagee could have called in the entire amount secured whenever he liked.

The question is whether the plaintiff after the interview of October 4 had a right to say that the contract was off. In my opinion he had not that right, because the defendant had until November 10, the day fixed for completion, to procure the consent of the lessor to the condition as to the mortgage. The plaintiff might have receded from the position that he took upon October 4 when he found that the condition had been agreed to by the lessor. It was in his power to say that he was ready and willing to complete, and had he done so there would have been nothing to prevent him from suing the defendant if there were a breach of contract on his part. The plaintiff never did recede from the position he had taken up. It was through his default that the contract was not completed, and therefore he cannot be entitled to recover back the deposit. The appeal must be allowed.

COLLINS L.J. The crucial question in this case is whether the plaintiff was justified in treating what happened on October 4 as a final declaration by the defendant of his inability to carry out the contract. If he was justified in so treating it, then he could rescind the contract and sue on the rescission. He would have been also justified, if so minded, in refusing to treat the contract as rescinded, but his rights in the two cases would be entirely different and incompatible, and could not be asserted simultaneously. It is

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Collins L.J.

proved beyond all question that the plaintiff on October 4 finally withdrew from the contract, and from that day to this has not altered his position. If he was right in treating that which happened on October 4 as a final refusal by the defendant to carry out the contract, he is right in this case. If he had legal grounds for so treating the matter he was within his rights; otherwise he was in the wrong. What ground, then, had he for saying that what took place on October 4 was a final refusal by the defendant to carry out the contract, or a final declaration by the defendant of his incapacity to do so? It is true that at the interview of October 4 the defendant was not in a position to say that the condition attached to the contract could be performed; but the contract does not say that the condition was to be performed before the date fixed for completion. If it is to be established that inability to perform the condition at some date before the day fixed for completion is to be a ground for rescission, that must be found in the contract itself, or in some independent agreement by which the parties have agreed so to treat it. There is no evidence of any such agreement or of any custom to that effect, and consequently the defendant remained with all his rights unimpaired up to the date fixed for completion. The plaintiff has wrongfully treated the events of October 4 as final and conclusive, and cannot now aver readiness and willingness on his part to perform the contract. It was sought to establish an alternative right in the plaintiff to treat the contract as existing, and to succeed on the ground that the defendant had not performed the condition by the date fixed for completion; but the plaintiff having finally renounced the contract and adhered to this throughout cannot be heard to say that he was ready and willing to complete. This view of the law is nowhere more clearly stated than by Lord Esher M.R. in *Johnstone* v. *Milling*. (1)

I agree, therefore, that the appeal must be allowed.

ROMER L.J. But for the arguments that have been adduced to us, I should have thought that the law on this matter was sufficiently settled. Such conditions as that which occur in

(1) (1886) 16 Q. B. D. 460, at p. 467.

this case are not uncommon in cases of the purchase of real estate, the contract being that the vendor shall procure that persons who have lent money on the security of the property should accept the purchaser as mortgagor instead of the vendor. To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor. Though the condition is one that may be fulfilled at any time before completion, yet the purchaser is not always bound to wait till that date. I can suggest four such cases, though I by no means say that the list is exhaustive. One case is that the purchaser may be able to shew by sufficient evidence that the condition cannot be practically fulfilled by the date fixed. A second case is where the vendor has substantially admitted that the condition is incapable of fulfilment. The third case is that there may be an agreement between the vendor and the purchaser that a particular refusal of the mortgagee to accept the purchaser as mortgagor should be taken as conclusive, and this agreement may be implied from the circumstances and need not be express. The fourth case is that of a refusal by the mortgagee so treated by the vendor as to justify the purchaser in regarding the matter as at an end. It lies upon the purchaser to establish an agreement or special circumstances which justify him in treating the contract as at an end, and, if he goes back from his contract without sufficient justification, the vendor may treat the purchaser as having broken the contract, and would be relieved from further carrying it out or performing the condition. The purchaser in that case cannot recover the deposit. I need not consider what might happen if the purchaser retired from the position which he had taken up after ascertaining that the vendor refused to treat the repudiation of the contract as justifiable.

All the cases that were cited were, with one exception, cases in which the purchaser ascertained before the time for completion that the vendor had not the title which he professed to have, and had no legal means then available to complete the

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contract. In such cases the purchaser is entitled at once to treat the contract as at an end because the vendor cannot ask the purchaser to wait on the chance that the former may acquire the property. These cases have no bearing on the one before us. The only one that has any bearing is *Davis* v. *Nisbett* (1), but what was there decided in no way interferes with anything decided by us in this appeal. The case came before the Court on demurrer, and the statement of the fifth plea was treated by the Court in substance as an averment of final and irrevocable disapproval of the person proposed as tenant. From that point of view the case would fall within one of the cases that I have mentioned as a failure to perform the condition which can be shewn to be final and conclusive. It is true that in that case Willes J. said that the true construction of the agreement was, not that the parties are to go on from day to day doing nothing until the day for completion, but that application was to be made to the lessor for his approval within a reasonable time, and that whether the contract was to be carried into effect or not was to depend upon the issue of that application; but those observations were made with reference to the case before the Court, in which he came to the conclusion that the refusal of the landowner was to be considered as final and conclusive.

It seems to me clear that the present case does not come within any of the illustrations that I have given, and it is plain that the vendor did not treat the refusal of the mortgagee as final. The purchaser under these circumstances was not entitled to treat the contract as determined, and that makes an end of the case.

As to the stipulation that the existing arrangement as to paying off by instalments the money secured by the mortgage should remain in force, it is sufficient to point out that the money was payable on demand, and the stipulation imposed no burden on the plaintiff.

I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Benwell & Norfolk.*

Solicitor for defendant: *S. J. Attenborough.*

(1) 10 C. B. (N.S.) 752.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
April 12.
1900
Feb. 20, 21.

RICHARDSON *v.* STORMONT, TODD & CO., LIMITED.

Stock Exchange—Defaulter—Official Assignee—Assignment of Assets—Rules and Regulations of Stock Exchange.

It is provided by the rules and regulations of the Stock Exchange that two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter on the Stock Exchange his books of account and a statement of the sums owing to and by him and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange; and by rule 176 "the assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible":—

Held, that the term "the assets" in the above-mentioned rule means all the assets of the defaulter; and that, when the rule is brought into operation, the effect is to create an assignment of the assets of the defaulter to the official assignee.

A member of the Stock Exchange was indebted to the defendants. He became a defaulter on the Stock Exchange, and the liquidation of his affairs was undertaken by the plaintiff, as official assignee, under the above-mentioned rules. For the purposes of the liquidation he was authorized by the plaintiff to sell, and accordingly sold, certain shares standing in his name to the defendants, who were not members of the Stock Exchange, but who knew his position and that of the plaintiff as official assignee. The plaintiff having sued the defendants for the price of the shares:—

Held, that the action was maintainable, and that the defendants were not entitled to a set-off in respect of their debt.

ACTION tried before Mathew J. in the Commercial Court without a jury.

The action was brought to recover the sum of 187*l.* 10*s.*, as being the unpaid balance of the sum of 315*l.* 15*s.*, the price of 2105 preference shares in a company called the Westralian Market Trust, Limited, sold to the defendants by the plaintiff, as official assignee of the London Stock Exchange, at the price of 3*s.* per share. The plaintiff in his points of claim alleged that the shares formed part of the assets of one Reavely who had been declared a defaulter on the London Stock Exchange; that it became the duty of the plaintiff, as official assignee of the Stock Exchange, to collect the assets of Reavely and

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distribute them according to the rules of the Stock Exchange; and that Reavely had sold the shares to the defendants as agent for the plaintiff, as the defendants well knew. The defendants by their points of defence alleged that Reavely did not sell the shares to them as agent for the plaintiff, but as principal and as owner of the shares; that the plaintiff, as official assignee of the Stock Exchange, could in any case take no greater rights against them in respect of the sale of the shares than Reavely had; and that Reavely was indebted to them at the time of the sale in the sum of 187*l.* 10*s.*, which sum they claimed to set off against the price of the shares.

It appeared that Reavely, who was a member of the Stock Exchange, had been declared a defaulter on the Stock Exchange, and had thereupon in pursuance of the rules of the Stock Exchange hereinafter set forth handed over his books and accounts to the plaintiff, as official assignee, who had proceeded to collect his assets under rule 176 of the Stock Exchange rules and regulations. The shares, for the price of which the action was brought, had been issued to Reavely in part satisfaction of a debt due to him from a company called the West Australian Market Trust, Limited, in respect of differences on transactions in which he had acted as their broker on the Stock Exchange. The facts with regard to the issue of the shares and the sale of them to the defendants sufficiently appear from the judgment of Mathew J. The defendants had, as appears from the judgment, paid 128*l.* 5*s.* on account of the price of the shares. At the time of the sale there was a debt of 187*l.* 10*s.* due from Reavely to the defendants, who had been clients of his on the Stock Exchange, in respect of the balance of a sum deposited with him by them by way of cover for a stock exchange transaction.

Among the rules and regulations of the Stock Exchange, which every member expressly binds himself to observe, are the following: 150. "A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee." 161. "The committee will not recognise any claim on a defaulter's account that does not rise from a stock exchange transaction." "Official

assignees." 174. "Two or more members shall be appointed annually by the committee, to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings, to enter into a strict examination of every account, to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange." 176. "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

Reed, Q.C., and *F. M. Abrahams*, for the plaintiff.
Isaacs, Q.C. and *A. G. M. McIntyre*, for the defendants.

1899. April 12. MATHEW J. This is an action brought to recover the sum of 187*l.* 10*s.*, the balance of the price of shares alleged to have been sold by the plaintiff to the defendants. The defendants have paid 128*l.* 5*s.*, and claim to set off in respect of the balance the sum of 187*l.* 10*s.* The question in the case is whether the defendants are entitled to that set-off.

The plaintiff was the official assignee of the Stock Exchange, and it appeared that a gentleman named Reavely, a member of the Stock Exchange, had become a defaulter on May 4, 1898. Under the rules of the Stock Exchange the plaintiff proceeded to liquidate the liabilities of Mr. Reavely. A question has been raised as to the meaning of the rules of the Stock Exchange on the subject. I am clear that the intention and object of the rules, which Reavely subscribed and agreed to when he became a member of the Stock Exchange, and particularly of rule 176, is to entitle the official assignee to take possession of all the assets of the defaulting debtor, and distribute those assets among the members of the Stock Exchange who are creditors. Such an arrangement is obviously one that would be unjust to any creditors who were outside the Stock Exchange, and it would be open to any creditor not intended to be benefited by the assignment to the official assignee to

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take proceedings in bankruptcy under which there would be an equal distribution of the assets of the debtor among all the creditors. It was argued that the rules did not bear this interpretation, but in my opinion they clearly disclose the intention that the official assignee shall have the right which I have mentioned on behalf of the creditors belonging to the Stock Exchange. It was suggested that the description of the plaintiff as official "assignee" was inaccurate, and that he did not acquire any rights by assignment, but his true position was that he merely acted as agent for the defaulter. I do not think that was the intention of the rule. I think that it was intended, when he was described as official assignee, that he should take under the rule as by an assignment; and that he therefore holds the ordinary position of a person to whom the assets of a debtor are transferred by an assignment for the benefit of creditors.

That being, as it appears to me, the meaning of the rules, the facts with regard to the present case are these. Mr. Reavely had a claim against a company called the West Australian Market Trust, Limited, which amounted to 5339*l.* That claim passed by the assignment to the plaintiff as official assignee, and he took steps to realize it. The company could not pay the amount. There was a scheme of reconstruction. The plaintiff attended the meetings with reference to that reconstruction, and was actually asked by the members of the company to act upon a committee appointed with reference to this claim and other claims against the company. He declined to act in that position, but he was fully cognisant of all that was being done. The scheme of reconstruction which was proposed was this: that there should be a new company called the Westralian Market Trust, Limited, which should take over the liabilities of the old company, paying 12*s.* in the pound in cash and 8*s.* in shares. The plaintiff assented to that arrangement, which was sanctioned by the committee of the Stock Exchange, and he empowered Reavely to execute the deed giving effect to it, which he accordingly did. By virtue of that deed Reavely became entitled to the shares, which it was arranged should be allotted to him and

should stand in his name, there being no provision made in the deed for an allotment to any nominee.

In that state of things, this deed having been entered into, and before the shares were actually handed over to Reavely, he entered into negotiations with the plaintiff for the realization of the shares. It was very important to him, as appears from the correspondence, that they should be realized. There was no market for the shares, and he applied to the plaintiff to be allowed to endeavour to find a purchaser for the shares. In the first instance it was thought that they would be worth 4*s.* or 5*s.* each; but it was soon discovered that no such price could be obtained, and the position of affairs is shewn by a letter which on September 10 Reavely wrote to the plaintiff, and which is as follows: "I have seen my friends, and have at last succeeded in getting them to make an offer for the Market Trust preference shares. They at first refused, as they consider the shares valueless. They base their opinion on knowledge that they have that the assets of the Market Trust have hardly any value, requiring a large expenditure of capital to make them worth anything. They fail to see how the Market Trust can improve their assets with the small amount of money they have in hand, and are likely to have, when the debts are paid. Taking this into consideration my friends do not feel disposed to offer more than 3*s.* per share, which is the offer I am authorized to make on their behalf. I should feel very grateful if this offer were accepted, as I do not see any chance of getting a better one. An early answer will oblige. I am most anxious to get back to the Stock Exchange. Had I been back during this month, I could have earned enough to pay a further dividend to my creditors, as I hear my clients have been busy dealing with other brokers." The friends referred to in that letter were the defendants. It appeared that, after Reavely had become a defaulter, Messrs. Stormont & Todd had befriended him and given him a seat in their office; but their names are not disclosed in the first instance to the plaintiff. It is admitted that at the time when Reavely became a defaulter the defendants had a claim against him for 187*l.* 10*s.*, and they had actually carried in that claim and submitted it to

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the plaintiff, as official assignee, claiming a dividend in respect of it, which shews what indeed was clear enough from the other evidence in the case, namely, that Messrs. Stormont & Todd were thoroughly familiar with the rules of the Stock Exchange, and knew what was the position of the official assignee. They had been in former years members of the Stock Exchange themselves, but had ceased to be so for some time. In answer to Mr. Reavely's letter the plaintiff wrote on September 13: "I am instructed to inform you that the committee of creditors will accept the offer of 3*s*. per share for the Market Trust preferences, provided the transaction is carried out at once." That was a clear intimation that the plaintiff expected to receive, as he said, 3*s*. per share for those shares. Not a word had been said about any set-off or deduction; and, when the plaintiff wrote the letter, nothing of the sort was present to his mind. The next letter is that of September 19 from Mr. Reavely to the plaintiff, which is as follows: "I have placed the preference shares at 3*s*., and my clients will pay the amount due on next pay-day. Will you kindly send me a line confirming the sale of the shares for next pay-day to Messrs. Stormont & Todd at that price." That is the first intimation that the defendants were the buyers of the shares. After that letter was received the plaintiff saw Mr. Stormont, who was a director of the defendant company, at London Bridge Station, when this matter was referred to. The plaintiff detailed what had passed, and Mr. Stormont was informed by him of the exact position of things. The plaintiff said, "It will not be necessary that I should write: I understand that the offer was made and I accept it"; and the other said, "All right," or something of that sort.

Now what was the meaning of those statements and the result of the interview? It is perfectly clear that the plaintiff had no idea that he was not to be paid in full. He had no notion that there was any cross-claim. I am satisfied that he went away with the impression that he was to receive the full amount of 3*s*. per share for distribution among Reavely's creditors on the Stock Exchange. Mr. Stormont was not called, being out of the country. I therefore take the plaintiff's

statement of the result of the interview as correct; and what Mr. Stormont subsequently did is strong evidence of the impression left upon his mind. Shortly afterwards it was announced that the shares were ready to be transferred, and it was expected by the defendants that they would be tendered to them for transfer at any time after September 29. On that day, under Mr. Stormont's direction, a cheque was drawn for what was supposed to be the full price of the shares. There was some inaccuracy in the amount of the cheque, and therefore the first cheque was cancelled; but on the following day a cheque was drawn under Mr. Stormont's direction for the right amount, which was left in the hands of the defendants' secretary to be handed over as soon as the shares were transferred. If the shares had come in on September 30, that cheque would have been handed over and passed to the plaintiff as official assignee. But there was some delay, because the numbers of the shares had not been ascertained, and it was not until October 4 that the shares were ready for delivery. By that time the attention of Mr. Todd, a director of the defendant company, had been called to the matter. He directed that the second cheque should be cancelled, and that a cheque should be drawn for the sum of 128*l.* 5*s.* only, deducting the alleged set-off of 187*l.* 10*s.* The cheque so drawn was indorsed by Mr. Reavely, and given by him to the secretary with a direction to hand it to the plaintiff. The cheque was taken to the plaintiff's office, and left there with his assistant, who knew nothing about the circumstances of the case, and had no authority to accept the cheque in settlement of the plaintiff's claim. As soon as it was ascertained what had been done, an objection was at once made, and, on behalf of the committee of the Stock Exchange, the defendants were informed that they must pay in full.

Now what is the result of all the evidence? It is clear to me that the defendants, in purchasing these shares, dealt with Reavely as the agent for a disclosed principal or principals, the official assignee and the creditors on the Stock Exchange. There is not a doubt on the evidence of Mr. Todd that he knew perfectly well what the position of things was; that

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he knew what the official assignee was doing, and what his duty was under the rules of the Stock Exchange. He attempted in this way to get the company paid their debt in full with this knowledge; but, as I have said, I am satisfied that the defendants were dealing with Reavely not as principal, but as agent for the official assignee and the creditors on the Stock Exchange. Upon that ground my judgment in this case must be for the plaintiff. I consider at the same time that there is ample ground for the other position taken briefly by Mr. Reed on behalf of his client. It was this: that Reavely was in a fiduciary position, and received and held these shares on behalf of his creditors on the Stock Exchange; that the defendants knew well what the fiduciary position was, and their attempt so to pay themselves in full at the expense of those to whom they knew the proceeds of the shares to belong was inequitable, and therefore not allowable. On that ground, as well as on the ground which I first stated, I consider that the plaintiff has made out his case, and therefore there must be judgment for him for the amount of the claim.

Judgment for the plaintiff.

The defendants appealed.

1900. Feb. 20, 21. *Isaacs, Q.C.*, and *A. G. M. McIntyre*, for the defendants. This case turns on the question what rights the plaintiff took as official assignee under the rules of the Stock Exchange relating to the liquidation of the estates of defaulters. It is contended that those rules can only apply to the debts and liabilities existing as between the defaulter and other members of the Stock Exchange; and that the "assets" contemplated by rule 176 must be what may be called Stock Exchange assets only, and cannot include all the assets of the defaulter. Rule 176 only gives authority to the official assignee to get in Stock Exchange debts due to the defaulter. The defendants in this case were not members of the Stock Exchange, but outsiders; the shares sold were not Stock Exchange assets of the defaulter, and the sale of the shares was not upon the Stock Exchange or subject to its rules. The right of the

defendants to set off the debt due to them from Reavely against the price of the shares sold to them by him is not therefore affected by rule 176. The effect of the rule is not that there is an assignment, either legal or equitable, to the official assignee of the debts due to Reavely. At the most it could merely operate by way of contract on the part of the member, though it may be doubtful whether there would be a good consideration for such a contract, by which he agreed to authorize the official assignee, as his agent, to collect debts due to him in the event of his being declared a defaulter on the Stock Exchange, and apply the proceeds in accordance with the rules. It is submitted that the rule is really disciplinary, and defaulters carry it out voluntarily in order to get themselves readmitted to membership of the Stock Exchange. Therefore, the true position of the plaintiff was that, as official assignee, he was merely acting as agent for Reavely, and consequently he is not entitled to maintain the action. The plaintiff had neither the legal or equitable property in the shares sold by Reavely. At most he had only authority to collect them, and he never did so. In the case of *Tomkins* v. *Saffery* (1) there was, it would seem upon the facts stated, a cessio bonorum apart from the mere operation of the Stock Exchange rules.

[They also cited *Ex parte Grant, In re Plumbly*. (2)]

Reed, Q.C., and *F. M. Abrahams*, for the plaintiff, were not called upon.

A. L. SMITH L.J. I entirely agree with the judgment of the learned judge. The action is brought by the plaintiff, as official assignee of the Stock Exchange, to recover the balance of the price of certain shares sold to the defendants, and the defendants claim to set off against that balance a debt due from one Reavely to themselves. The questions in the case turn upon the true construction of the rules of the Stock Exchange, Nos. 174 to 176. Rule 176 provides that the official assignees "shall collect and pay the assets" of a defaulter "to the credit of their joint account at a banker's, and shall distribute the same as soon as possible." The first question is, what is the

(1) (1877) 3 App. Cas. 213. (2) (1880) 13 Ch. D. 667.

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A. L. Smith L.J.

meaning of the words "the assets" in that rule? One view suggested is that the meaning of the rule is that the assignees are to collect only the Stock Exchange assets of the defaulter, i.e., the debts due to him on the Stock Exchange. It must be observed in the first place that there are no words importing any such limitation of the rule. The words "the assets" primâ facie mean all the assets. Is there any authority to guide us as to the meaning of the rule? The case of *Tomkins* v. *Saffery* (1), if not a decision on the point, affords at any rate a strong indication of opinion on the part of three of the noble Lords who decided it to the effect that the words "the assets" as used in this rule mean the whole of the defaulter's property. The view of the Lord Chancellor (Lord Cairns), as I gather it from his judgment, clearly appears to have been that the rules of the Stock Exchange meant by the term "the assets" the whole of the assets. Lord O'Hagan's judgment is to the same effect. Lord Blackburn says with regard to the rule: "A good deal has been said on a matter which becomes important here from one point of view, namely, what is meant by this rule when it says 'the assets.' I confess, my Lords, my own impression is that it means, not only that the official assignees shall collect the assets, but that a defaulting member is bound by the agreement which he made when he entered the Stock Exchange to give them the assets: that is to say, the whole of his available property is to be handed over to them . . . . nevertheless, whether it means the whole assets, which I certainly think it does, or whether it means only such portions of the assets as they could honourably obtain, which is the contention of the appellants, either way it means some assets." Having regard to what was said in that case, and to the fact that there are no words in the rule to limit the primâ facie meaning of the words "the assets," I come to the conclusion that the meaning of the rule is that the assignees are to collect all the assets of the defaulter and distribute them among his creditors upon the Stock Exchange. The next question raised was whether, assuming that the words "the assets" in the rule mean all the assets of the defaulter, the plaintiff as official

(1) 3 App. Cas. 213.

assignee was entitled under the rule to sue for the balance of the price of the shares. With regard to that question, I agree entirely with the judgment of Mathew J. and adopt his reasoning. I think also that, in addition to the reasons which he has given, there is another reason upon which his judgment may be supported. In my opinion, upon the facts as found by him, there is good evidence of a direct bargain as between the defendants and the plaintiff, the official assignee, that the full price of the shares should be paid without any set-off of the defendants' debt. I think this appeal must be dismissed.

COLLINS L.J. I am of the same opinion. I agree entirely with the conclusion of Mathew J. and the grounds upon which it was based. The case seems to me ultimately to resolve itself into a very small point—namely, what is the effect of the Stock Exchange rule? Did it either by itself or coupled with what was done afterwards under it constitute a cessio bonorum on the part of Reavely with regard to all his assets? It is not necessary for this purpose that there should be a legal assignment; an equitable assignment will suffice. If the operation of the rule was to produce a cessio bonorum, then there is an end of the first point suggested, namely, that the rules of the Stock Exchange only contemplate what have been called Stock Exchange assets. That view also gets rid of the second point, namely, that the rule only gives the official assignee authority to collect the assets as agent for the defaulter. In the case of *Tomkins* v. *Saffery* (1) there seems to me to have been not merely an expression of opinion, but an actual decision on the part of two noble lords, namely, Lord Cairns L.C. and Lord O'Hagan, to the effect that the operation of the Stock Exchange rules was in that case to constitute a cessio bonorum by the defaulter, and on that ground there was an act of bankruptcy; and, although Lord Blackburn did not in terms decide that the effect of the rule was of itself to constitute a cessio bonorum, he appears to have been of opinion that, if there was an intention that the whole of the assets should be transferred to the official assignee under the rule and an actual transfer of part in

(1) 3 App. Cas. 213.

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pursuance of that intention, there would be what was equivalent to a cessio bonorum, and so an act of bankruptcy. If it were necessary to deal with this case looking only to the opinion expressed by Lord Blackburn, I think that the view which he took would be applicable; for in the present case, I think there was an intention under the rule that all the assets of Reavely should be transferred to the official assignee, and part of them was actually transferred to him. It appears to me that upon the admitted facts of this case the plaintiff had at any rate in equity become the true owner of the shares when they were sold, and therefore the defendants as purchasers with full knowledge of the facts could not refuse to pay the price of them to the plaintiff or set off against it a debt due from another person.

ROMER L.J. I agree. The first question raised in this case is whether "the assets" of the defaulter contemplated by the rules of the Stock Exchange are limited to a particular class of assets or include all his assets. I think that upon the true interpretation of rule 176 it applies to all the assets of the defaulter. It is significant that the group of rules of which that rule is a member is headed "Official Assignees," and that rule 174 makes it the duty of the official assignees to manage "the estate" of the defaulter in conformity with the rules, regulations, and usages of the Stock Exchange. There is nothing whatever in the context to cut down the generality of the term "the assets" as used in rule 176. I therefore think that it must have its natural meaning and be taken to include all the assets. It has already been pointed out that substantially this point has been disposed of by observations made in the House of Lords in the case of *Tomkins* v. *Saffery*. (1) There was an attempt to suggest that there was no consideration for such an agreement with regard to the defaulter's assets, but that suggestion will not bear a moment's reflection. Each member of the Stock Exchange becomes a member on the footing that he will observe the rules, and there is ample consideration for their enforcement against any person so becoming a member.

(1) 3 App. Cas. 213.

The next question which arises is as to the rights of the official assignee under the rule. In my opinion he stands by virtue of it in the position of an equitable assignee of the assets of the defaulter. Applying that view to the facts of the present case: Reavely at the time when he became a defaulter had a debt due to him from the West Australian Market Trust, Limited. Of that debt he was the legal, and the plaintiff as official assignee became the equitable, owner. That debt was partly paid in cash, but part of it was, with the consent of the plaintiff, discharged by the issue of preference shares in a new company, which were issued to Reavely, and not, as they might have been, to the plaintiff. In what right did Reavely hold those shares as between himself and the plaintiff? Clearly I think he held them as the property and on behalf of the plaintiff as official assignee of the Stock Exchange. All those facts were known to the directors of the defendant company. They also knew that the plaintiff had consented to the sale of the shares by Reavely on behalf of himself as official assignee. Under those circumstances they could not possibly be entitled to set off against the purchase-money for the shares, which they knew were in equity the property of the plaintiff, the debt due to them from Reavely. It is clear that the unpaid balance of the purchase-money is in equity the property of the plaintiff, as official assignee, and therefore that he is entitled in equity to sue for it. There might possibly be a difficulty on a question of form, if it had been raised, namely, whether Reavely ought not to have been made a co-defendant in the action. But that is a mere technical point which has not been raised, and which the defendants certainly ought not to be allowed to raise in this appeal.

Appeal dismissed.

Solicitors for plaintiff: *Michael Abrahams, Sons & Co.*
Solicitors for defendants: *Spyer & Sons.*

E. L.

1900
Feb. 19, 20, 26.

[IN THE COMMERCIAL COURT.]

PARSONS *v.* THE NEW ZEALAND SHIPPING COMPANY.

Ship—Bill of Lading—Description of Goods—"Marked and Numbered as in the Margin"—Mistake—Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

By the Bills of Lading Act, 1855, s. 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped. . . ."

A bill of lading described goods as "marked and numbered as in the margin." Some of the goods shipped were marked and numbered differently from the description in the margin, but this marking and numbering did not affect or denote the substance, quality, or commercial value of the goods.

In an action for damages for short delivery, brought by the consignee against the shipowners' agents, who had signed the bill of lading:—

Held, that the defendants were not prevented, by the Bills of Lading Act, 1855, s. 3, from shewing that there was a mistake in the marginal description, and that these goods formed part of the quantity set forth in the bill of lading, and were shipped as part of the plaintiff's consignment.

Bradley v. *Dunipace*, (1862) 1 H. & C. 521, distinguished.

TRIAL of action in the Commercial Court before Kennedy J.

The plaintiff, who was the consignee of a number of lambs' carcasses shipped from New Zealand, sued the defendants, who were agents in New Zealand for the owners of the vessel on board which the carcasses were shipped, to recover damages for short delivery of 154 carcasses. The two bills of lading relating to the plaintiff's claim were signed by the defendants' manager, and described the goods included in them as "marked and numbered as in the margin." The marking and numbering upon some of the carcasses shipped differed from the marking and numbering in the margin of the bills of lading, and the question of law which arose in the case was, whether the defendants, having signed the bills of lading by their agent, were concluded by the terms of the Bills of Lading Act, 1855

(18 & 19 Vict. c. 111), s. 3, or were entitled to shew that the carcasses, the marking and numbering of which differed from those specified in the margins of the bills of lading, were by mistake incorrectly described in the margins of the bills of lading, and were shipped as part of the total quantities shipped under the bills of lading, and that the defendants were entitled to offer, and the plaintiff was bound to accept, those carcasses, as part of the plaintiff's consignment, notwithstanding the erroneous description.

The facts on which this question arose are fully stated in the judgment.

Feb. 19, 20. *Danckwerts*, Q.C. (*Loehnis* with him), for the plaintiff. By s. 3 of the Bills of Lading Act, 1855 (1), it must be taken, as against the defendants, who have signed the bills of lading by their agent, that the carcasses described in the bills of lading were put on board. The marginal specification in the bill of lading is a material part of the description: *Bradley* v. *Dunipace*. (2) In the face of the unqualified signature, by their agent, of the bills of lading, the defendants are not entitled to set up an alleged mistake in the marginal description. For the purposes of insurance, the marginal description must be material. The defendants seek to shew that part of the marginal description is incorrect, and seek to apply in satisfaction of the plaintiff's claim other goods, which are marked and numbered differently from the marginal

(1) 18 & 19 Vict. c. 111. By s. 1, rights and liabilities under bills of lading are vested in consignees and indorsees.

By s. 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

(2) (1861) 7 H. & N. 200; 31 L. J. (Ex.) 210; affirmed in Exchequer Chamber, (1862) 1 H. & C. 521; 32 L. J. (Ex.) 22.

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description. They cannot do this, and the plaintiff is justified in rejecting the goods which do not correspond with the marginal description, and is entitled to damages in respect of short delivery.

Carver, Q.C. (*Leck* with him), for the defendants. The figures in respect of which the description in the margin of the bills of lading differs from the marking and numbering of the carcasses shipped are not any material part of the description of the goods. They do not in any way affect the substance, quality, or value of the goods shipped, but are used merely for the purpose of identification, and in order to enable the shippers to carry on their business conveniently, and do not affect the contract of carriage. If the statute were held to be binding in such a case, serious injustice would be brought about by a clerical error.

[The following authorities were also referred to: *Jessel* v. *Bath* (1); *Blanchet* v. *Powell's Llantivit Collieries Co.* (2); *Brown* v. *Powell Duffryn Steam Coal Co.* (3); *Lohden* v. *Calder* (4); *Owners of Cargo on board Steamship Waikato* v. *New Zealand Shipping Co.* (5)]

Danckwerts, Q.C., replied.

Cur. adv. vult.

Feb. 26. The following written judgment was delivered by

KENNEDY J. This is an action brought by the plaintiff, the consignee in London of a quantity of lambs' carcasses from Timaru, New Zealand, against the defendants, who were the agents in New Zealand for the owners of the steamship *Fifeshire*, in which the goods were carried, and who signed the bills of lading. The claim is for damages for short delivery of 154 carcasses. Each of the bills of lading—two in number—relating to the claim in this action describes the goods included in it as "marked and numbered as in the margin," the body of the bill of lading in the one case giving a total of 1166 carcasses, and the marginal description containing (inter alia) "Sun

(1) (1867) L. R. 2 Ex. 267.
(2) (1874) L. R. 9 Ex. 74.
(3) (1875) L. R. 10 C. P. 562.
(4) (1898) 14 Times Rep. 311.
(5) [1898] 1 Q. B. 645; affirmed [1899] 1 Q. B. 56.

Brand 488 X 226 carcasses." The body of the bill of lading in the other case gives a total of 1076 carcasses, and the marginal description contains (inter alia) "Sun Brand 622 X 608 carcasses." On the ship's arrival in London 53 carcasses of the former description, so far as regards the figure 488, and 100 carcasses of the latter, so far as regards the figure 622, were found to be wanting. But there were on board 21 carcasses marked "Sun Brand 388 X," and 102 carcasses marked "Sun Brand 522 X," which were not required by any other importer, and to which no bills of lading given in respect of the cargo laden on board the *Fifeshire* related, except, as the defendants contend, the two bills of lading already mentioned, of which the plaintiff was the holder. If these carcasses were treated as carcasses included in these two bills of lading, although incorrectly described in the marginal description as being marked "488" instead of "388," in the one case, and "622" instead of "522," in the other, there was still a deficiency in the number ready for delivery of 31 carcasses.

The plaintiff in this action claims damages for the non-delivery of 154 carcasses. The defendants admit the claim in regard to the deficiency of 31 carcasses, and in respect of that they paid into court, after service of the writ of summons, a sum of 29*l.*, which exceeds the nett invoice cost at the rate of 3*s.* 8*d.* per stone of 8 lbs. By the terms of the bill of lading the shipowners' liability, in case of loss or detention or injury to goods, for which they may be responsible, is to be calculated on, and in no case to exceed, the nett invoice cost. I hold that the defendants are entitled to the benefit of this clause, and therefore, in regard to the plaintiff's claim as regards 31 carcasses, the plaintiff's claim was satisfied by the payment into court.

In regard to the larger subject of claim—123 carcasses—the main issue is this. The defendants say, "The 21 Sun Brand 388 X, and the 102 Sun Brand 522 X, really formed part of the plaintiff's consignment, and were erroneously described in the margins of the two bills of lading—in the one as '488' instead of '388,' and in the other as '622' instead of '522.' We

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carried these carcasses as part of the goods included in the two bills of lading; we tendered the plaintiff these as part of his consignment; we therefore performed our contract, and his refusal to accept them as part of his goods was unjustifiable." The plaintiff, on the other hand, does not admit the fact that these carcasses did form part of his consignment, in the sense of being shipped and intended to be included in the totals set forth in the bills of lading; and further he says, as a matter of law, that the defendants, having, by their manager Mr. Bennett, signed the bills of lading, are concluded by s. 3 of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), and cannot be allowed to prove an error in the marginal statement of the bills of lading as to the numerical marking of 123 of the carcasses (21 in the one case and 102 in the other). He contends that these bills of lading so signed are not only conclusive evidence against the defendants of the total number of carcasses therein respectively stated to be shipped, and of the carcasses being of the quality, "Sun Brand X," and of the grade of weight designated in the margin, in the case of one bill of lading by the final figure "8," and in the other by the final figure "2," but also conclusive evidence of the shipment of quantities designated in the margins of these bills of lading with the marginal markings "622" and "488."

Upon the evidence and statements before me, I find the facts, so far as they appear to me to be material, to be these: The "Sun Brand" is a registered brand of the shippers, the Christchurch Meat Company, Limited, under whose form of bill of lading, signed by the defendants' manager, the meat in question was shipped. That brand and the "X" denote quality. Of the three-figure numbering, whether 488, 388, 622, or 522, the final figure is important, because it denotes what may be called the classification of weight, as e.g. 35–40 lbs., or as the case may be. The duplication of this figure, 88,22, and so on, is a peculiarity of these shippers, to indicate both that the meat comes from their "factories," as the killing and freezing places appear to be called, and that the meat is their own property, and has not been frozen and shipped by them as agents for other persons. The first figure, as e.g. the 6 in 622 or the

4 in 488, simply records the date of killing and freezing, and so, for the purpose of his own accounts, it has its use or importance for the shipper, just as the duplication of the 2 or the 8 has; but neither the first figure nor the duplication of the following figure has, as I understand the evidence, any distinctive value as regards the market for the meat. In other words, and to sum up, given the "Sun Brand" and "X," and the final figure, the meat is, as a commercial article, absolutely unaffected in its character or value, whether it is marked 522 or 622, 488 or 388.

Secondly, I find as a fact that in practice and according to the course of business in shipment, the only tally, at Timaru, made on behalf of the ship, is a tally of the number of carcasses. The work proceeds rapidly, day and night, and no attempt is made to check the shippers' marks or numbers upon the individual carcasses. The carcasses are brought in insulated vans from the freezing store, some distance away, to the mole or breakwater where the ship lies, and thence are shot at once down a shoot through the ship's side into the refrigerating chamber of the ship.

Thirdly, I find as facts, in regard to the carriage and discharge, that there were no other shipments on board the *Fifeshire* of "Sun Brand X" with duplicated 2, or duplicated 8, under any bills of lading other than those of which Parsons became the holder, nor were there any claims by any other consignees for the 21 "388," or the 102 "522," which the defendants sought to deliver to the plaintiff as part of his consignment. Indeed, so far as I can discover, by looking for myself at the documents, though I do not on my note find any oral statement in evidence to that effect, I do not find that any "Sun Brand" at all were shipped under any bills of lading except these to any consignee. (1)

In the result, I have come to the conclusion, upon the question of fact, that the defendants have discharged the burden

(1) Counsel stated at the close of the judgment that there were some other carcasses marked "Sun Brand X 62" and "48," but not with the duplicated final figures, shipped to consignees other than the plaintiff. The learned judge said that that fact did not affect his judgment.

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of proof, which undoubtedly lay upon them, and that the true inference from the evidence is that the 21 "Sun Brand 388 X," and the 102 "Sun Brand 522 X," which the defendants asked the plaintiff to take as part of his consignment, did respectively form part of the quantities set forth in the two bills of lading, and were, by the shipper's error, incorrectly included in the respective marginal specifications under "488" and "622."

Upon the point of law, I have come to the conclusion that the defendants are not prevented by s. 3 of the Bills of Lading Act, 1855, from shewing and relying upon these facts in order to establish that 21 fewer carcasses "Sun Brand 488 X," and 102 fewer carcasses "Sun Brand 622 X," were shipped than are stated in the margins of the bills of lading, and that there were shipped as part of the total quantities stated in these bills of lading respectively, 21 "Sun Brand 388 X," and 102 "Sun Brand 522 X." I so hold upon the ground that, in my view, the section referred to does not operate to make the bill of lading conclusive as to the statement of marks upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value. To interpret this statutory enactment, as Mr. Danckwerts for the plaintiff has invited me to interpret it, so as to prevent the party sued as the party responsible for the carriage of goods under a bill of lading, and, I will assume, signing the bill of lading, from shewing, not that he has carried fewer goods than the bill of lading specifies, or goods different in substance, or quality, or value, from those which are specified in the bill of lading, but that the bill of lading has been incorrectly filled up in regard to the statement of the marks put upon parcels of goods by the shipper for purposes of identification or record, would be, as it appears to me, to strain the meaning of the section. It was not unfairly urged, I think, by Mr. Carver for the defendants that, if the statute operates in such a case as this, the shipowner who signs a bill of lading would be conclusively bound by a clerical error in a bill of lading in the description of an immaterial mark. No authority, as it appears to me, has been cited which really supports such an interpre-

tation as that for which the plaintiff contends. *Bradley* v. *Dunipace* (1) is, I think, distinguishable. The weight there, as the judgment of the Exchequer Chamber delivered by Wightman J. points out, was of some importance in the contract. The plaintiff's counsel suggested in this case an importance of the mark in regard to insurance; but it appears to me that a difficulty in matters outside the contract of shipment, or the nature and value of the goods themselves, is not a matter which ought to affect the question of the applicability of the statute to such a case as the present.

Taking this view of the case, it is unnecessary for me to consider the three other points upon which Mr. Carver also relied; first, that the defendants, on the face of the bills of lading, signed as agents only for the shipowners, as, in fact, they were, and therefore could not be successfully sued; secondly, in regard to the Bills of Lading Act, 1855, s. 3, that by the operation of the clause in these bills of lading, "The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address," the effect of that section, even if otherwise it would be such as the plaintiff contended for, was destroyed (see *Jessel* v. *Bath* (2)); and, thirdly, that, as the value and nature of the carcasses offered to the plaintiff by the defendants were the same as those of such carcasses as should have been delivered to him under the marks stated in the bills of lading, the plaintiff, as he was tendered an equivalent, could not substantiate his claim to damages. I will only say, so far as regards the last point, that it seems to me now, as I said during the argument, untenable. A carrier who fails to deliver cannot avoid the consignee's claim for damages by offering something which is not the thing to which the consignee is entitled, because it would be equivalent in value. The first point is not, I think, open to the defendants, because they have accepted in this action the position of the shipowners as carriers of the goods. There is more, I think, to be said for

(1) 7 H. & N. 200; 31 L. J. (Ex.) 210; affirmed 1 H. & C. 521; 32 L. J. (Ex.) 22.

(2) L. R. 2 Ex. 267.

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the second point, but I prefer to rest my judgment upon the ground which I have stated.

Judgment for defendants.

Solicitor for plaintiff: *Butcher.*

Solicitors for defendants: *William A. Crump & Son.*

P. B. H.

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Feb. 16.

BAILEY *v.* ISLE OF THANET LIGHT RAILWAYS COMPANY.

Lands Clauses Acts—Compensation—Injurious Affection—Intention to use Land for particular Purpose—Special Adaptability.

The claimants bought some land with the intention of building a school upon it, for which purpose it was specially adaptable. Before they had begun to build they received notice from a railway company to treat for the purchase of part of the land. In consequence of the construction of the railway the part of the land not taken by the company would be rendered less suitable for the purpose of a school; and there was no other site in the neighbourhood equally suitable for the purpose:—

Held, that in assessing the compensation payable to the claimants their intention to use the site for a school ought to be taken into consideration, although they had done nothing towards carrying that intention into execution.

CASE stated by an arbitrator on a reference to determine a question of compensation under the Lands Clauses Act.

The claimants, Misses F. and E. Bailey, in the early part of 1899 entered into a contract for the purchase of a plot of land at Margate, with the intention of erecting thereon a ladies' school, for which purpose the land was by reason of its nature and position well suited. After the contract had been so entered into, the Isle of Thanet Light Railways Company gave the claimants notice that they required to take a small portion of the said plot of land for the purposes of their railway. By reason of the construction of the railway the portion of the plot not taken would be rendered less suitable for the purposes of a ladies' school. And it was admitted that there was no other land in the neighbourhood equally suitable for that purpose. The claimants contended that, in assessing compensation in respect of the land not taken but injuriously affected as

aforesaid, the intention of the claimants to use it for a ladies' school, and its special adaptability for that purpose should be taken into consideration. For the company it was contended that the needs and intentions of the claimants in respect of the land in question should not be considered in determining the amount of compensation, but that there should be taken into account alone the value of the land taken, plus compensation (if any) for injuriously affecting the adjoining land on the basis of the land being the property of a claimant who did not intend to make any special use of it. The arbitrator awarded the sum of 1200*l.*, as purchase-money for the portion of the land taken, and as compensation for damage by reason of the injurious affection of the part not taken, if in the opinion of the Court the intention of the claimants and the adaptability of the land for the purposes aforesaid should be taken into consideration, and the sum of 726*l.* if in the opinion of the Court the intention and adaptability aforesaid should not be taken into consideration.

Macmorran, Q.C., and *E. F. Lever*, for the claimants. Compensation should be assessed with reference to what the claimants lose. They bought the land for a special purpose for which it is peculiarly suited, and they are entitled to be compensated on the basis of its value for that purpose. In *Ossalinsky* v. *Corporation of Manchester* (1) the owner of land adjoining Thirlmere Lake was held to be entitled to compensation on the basis of its special adaptability for the purposes of a reservoir.

Page, Q.C., and *Vesey Knox*, for the company. It is not disputed that any special adaptability of the land injuriously affected is to be taken into consideration for the purpose of ascertaining what the land is worth. But the arbitrator is not entitled to consider the claimants' peculiar needs. Their intention is immaterial. There is no case in which a mere intention to devote the land to a particular purpose, towards the execution of which intention nothing has been done, has been held to be a basis of compensation.

(1) Reported only in Browne & Allan on Compensation, p. 718.

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CHANNELL J. I think our judgment must be for the claimants. The intention of the parties to use the land for a particular purpose may properly be taken into account. Compensation must always be assessed on the basis of value of the premises to the particular claimant. The matter may be tested in this way. Suppose the land taken consisted of trade premises to which a goodwill was attached. The question for the tribunal which had to assess the compensation would be, not what was the market value of the premises, but what was their value to the trader, including the goodwill. Here these ladies bought the land for the purpose of building a school on it. If at the date of the notice to treat they had already built the school, it could not be disputed that they would be entitled to compensation on the basis of the injury to the school. Here the school was not yet built. But that fact cannot affect the amount of the compensation if the arbitrator was satisfied that the intention to build it really existed. No doubt if there had been another piece of land in the vicinity equally adaptable for a school the claimants would have been entitled to compensation only upon the basis of the market value of their land. But, it being admitted that there was no other site available for the purpose, I think they were entitled to compensation for the injury to the land as the site of a school, although it was not built.

BUCKNILL J. I am of the same opinion. I think the arbitrator was justified in taking into consideration the intention of the claimants, and the adaptability of the site for the purpose intended.

Judgment for claimants.

Solicitor for claimants: *W. C. Gouldings.*
Solicitors for company: *W. Webb & Co.*

J. F. C.

PALMER, APPELLANT; SNOW, RESPONDENT.

1900
Jan. 29.

Sunday Observance—Exercising "Worldly Labour, Business, or Work" on Sunday—Barber—29 Car. 2, c. 7, s. 1.

A barber who shaves customers on Sunday is not a "tradesman, artificer, workman, or labourer, or other person whatsoever" within the meaning of 29 Car. 2, c. 7, s. 1, which prohibits those persons from exercising any worldly labour, business, or work of their ordinary callings upon the Lord's Day (works of necessity and charity only excepted).

CASE stated under the Summary Jurisdiction Acts by the stipendiary magistrate of Wolverhampton.

An information was preferred by the respondent charging that the appellant, being a tradesman of Wolverhampton, to wit, a hairdresser, did exercise worldly labour, business, or work of his ordinary calling upon the Lord's Day, contrary to the provisions of 29 Car. 2, c. 7. (1)

The following material facts were stated in the case:—

The appellant carried on the calling of a hairdresser at Wolverhampton in a room where customers came and were shaved, or had their hair cut, as required, the appellant receiving payment therefor. He kept a boy to assist him in shaving customers. He carried on no other business on the premises, and no articles were bought or sold there. On the Sunday in question he kept open his room for the purpose of shaving and haircutting, and did shave several customers and cut the hair of others, but no articles were bought or sold there.

The magistrate, being of opinion that the appellant had exercised his "calling" or "business" for gain, and that he was a "tradesman" within the meaning of 29 Car. 2, c. 7, s. 1, convicted and imposed a fine upon him.

(1) 29 Car. 2, c. 7, s. 1, provides that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted); and that every person, being of the age of fourteen years or upwards, offending in the premises shall for every such offence forfeit the sum of five shillings."

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The question for the opinion of the Court was whether the magistrate's decision was right.

Montague Shearman, for the appellant. The appellant is not a "tradesman, artificer, workman, or labourer, or other person whatsoever" within the meaning of the Act. He is not a "tradesman," because that word is used in the ordinary sense of a person who buys and sells. At the date of the passing of the Act a barber held a much higher position than a tradesman. In the reign of Edward IV. barbers formed themselves into a guild, and their craft ranked as a profession at least equal to that of doctors. By 32 Hen. 8, c. 42, surgeons were prohibited from exercising "the feat or craft of barbery or shaving." A barber is not an "artificer," which denotes a skilled workman who makes something. He is not a "workman" or "labourer," because those words are intended to cover persons in the employment of others: *Reg.* v. *Silvester* (1), per Cockburn C.J. He does not come within the words "or other person whatsoever," which were held in *Reg.* v. *Silvester* (2) to apply to persons ejusdem generis with those previously specified.

H. Dickens, Q.C. (*W. Shakespeare* with him), for the respondent. Whether the appellant comes within the word "tradesman" or not, he is within the other words of the section. The Act was intended to strike at persons exercising "handy labour" on Sunday, and the case finds that he did work with his hands in shaving and cutting the hair of his customers. In *Phillips* v. *Innes* (3) the House of Lords held that a barber was a "handy labourer or worker" within the meaning of the Scottish Act of Parliament of 1579, c. 8, which prohibited "handy labouring or working being used on the Sunday." The English Act is meant to prohibit the same thing. A hairdresser's assistant, if he worked on Sunday, would be working in his ordinary employment; it can make no difference that the employer does the work himself. Further, a barber is a "tradesman"; he carries on the trade of shaving and haircutting in the same way as a carpenter or a smith carries on the trade of carpentering

(1) (1864) 33 L. J. (M.C.) 79, at p. 80.

(2) 33 L. J. (M.C.) 79.

(3) (1837) 4 Cl. & F. 234.

or shoeing horses. In Johnson's Dictionary and in Webster's the definition of "tradesman" gives that sense to the word.

CHANNELL J. I am of opinion that our judgment should be for the appellant. Upon the case as stated, all that we need decide is that a barber is not a "tradesman" within the meaning of s. 1 of 29 Car. 2, c. 7; but it would be unsatisfactory, I think, to base our decision upon that narrow ground, because it might be suggested that he came within the other words of the section. I am of opinion that he did not, and I think it better that we should say so in our judgment.

This case differs from *Phillips* v. *Innes*. (1) The Scottish Act upon which the decision of the House of Lords turned was in much more general terms. It begins with the statement that "no handy-labouring or working be used on the Sunday." If that enactment were in force in England, I should think, as the House of Lords held, that a barber came within it. But the statute (29 Car. 2, c. 7) only relates to the "worldly labour, business or work" of certain specified persons. The words which specify those persons are "tradesman, artificer, workman, labourer, or other person whatsoever," and the words "or other person whatsoever" have already been held to apply only to persons ejusdem generis with the persons before specified. The principal person specified is "tradesman." Now, although "tradesman" may be sometimes used to describe something different from a gentleman, or in contradistinction to other kinds of persons, I do not think the word is used in that sense in this Act. It means to denote a person carrying on a trade—buying and selling—and a barber does not come within that description. Nor is he an "artificer," which means a person who makes something. Nor does the barber in this case come within the description "workman" or "labourer," because in *Reg.* v. *Silvester* (2) those words have been interpreted to mean persons in employment, and that, in my opinion, is the natural construction of them. Cockburn C.J. said (3): "Now, applying 'any other person' to employer or employed, and assuming 'labourer' to include an agricultural

(1) 4 Cl. & F. 234. (2) 33 L. J. (M.C.) 79.
(3) 33 L. J. (M.C.) at pp. 80, 81.

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labourer, yet the term 'tradesman' cannot be extended by a reasonable construction to a farmer; and there being only these two classes, and we having to consider that of the employer and not of the employed, I cannot say that a farmer is ejusdem generis with a tradesman." Those observations are just as applicable to a barber and his assistant as to a farmer and his labourer. Blackburn and Mellor JJ. seem to have doubted whether an agricultural labourer would be a "labourer" within the meaning of the Act, and I think it may be doubted whether a barber's assistant comes within the description "workman" or "labourer." My decision is upon the ground that a barber is not within the description of any one of the people specified in the Act. At the time the Act was passed it seems that a barber was a person of much more importance than he is now, and one not likely to have been intended to be included amongst the persons prohibited from exercising their calling on a Sunday.

BUCKNILL J. I am of the same opinion. When the Act of 29 Car. 2 was passed, it is clear that a barber was a more important person than he is now, and I do not think the Act intended to include him. In my view he is not a tradesman, because he does not carry on a trade in the usual sense; nor is he a workman or labourer, because he is not in employment; nor is he within the concluding words of s. 1, because the ejusdem generis principle applies to those words. It was argued that the appellant was a labourer because, on the day in question, he was doing work himself—working or labouring with his own hands. I do not agree with that contention. He was none the less a barber—a person to whom the Act was not meant to apply. I am of opinion that the appellant is entitled to judgment, and the conviction should be quashed.

Conviction quashed.

Solicitors for appellant: *Maude & Tunnicliffe, for Dallow & Dallow, Wolverhampton.*

Solicitors for respondent: *Murr & Rusby, for Sharpe & Darby, West Bromwich.*

W. A.

DAVIS, APPELLANT; HARRIS, RESPONDENT.

1900
Jan. 18.

Landlord and Tenant—Distress—Things Privileged from Distress—Bedstead—"Bedding"—Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

The "bedding" privileged from distress for rent under the Law of Distress Amendment Act, 1888, and the County Courts Act, 1888, includes a bedstead used by the tenant as part of his sleeping accommodation.

CASE stated by a metropolitan police magistrate.

The respondent was summoned to appear before the magistrate at the Worship Street Police Court to answer a complaint made by the appellant under 2 & 3 Vict. c. 71, s. 39, alleging that the respondent unlawfully took from the appellant a certain article of furniture—to wit, a bedstead—by an illegal distress.

The following facts were proved or admitted at the hearing before the magistrate:—

The appellant was tenant to the respondent of a house on a weekly tenancy; and on May 25, 1899, there was due and owing from the appellant to the respondent for arrears of rent of the house a sum of 1*l.* 5*s.* On the same day the respondent by his duly authorized bailiff levied a distress upon the appellant's goods at the house. Amongst those goods was a bedstead with certain bedding thereon. The respondent's bailiff having removed the bedding from the bedstead, took away the bedstead and sold it, leaving the bedding in the house. (1)

(1) The Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4: "From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same."

The County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 96, protected from seizure in execution "the wearing apparel and bedding" of a person and his family "and the tools and implements of his trade to the value of 5*l.*" This Act is repealed by the County

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The magistrate stated his decision thus: "I come to the conclusion that although a bedstead might under certain circumstances be included in the term 'bedding,' yet, as the statute took away part of the landlord's security, and as it had not been the practice to include it in these cases, and there being no decision of the High Court upon the point, I ought to interpret the section strictly. I therefore dismissed the summons."

The questions for the opinion of the Court were, whether upon the facts the magistrate came to a correct conclusion in point of law, and, if not, what ought to be done in the premises.

Foà, for the appellant. The magistrate was wrong in holding that the word "bedding" did not include a bedstead in the Acts in question. In the ordinary use of language the word is frequently used as comprising the bedstead. It is so used by many English writers from Chaucer down to Mr. Rudyard Kipling, and the same sense is affixed to it in various standard dictionaries. In determining the sense in which it is used in this Act, the direct object of the Act must be looked at, which is to confer a benefit on tenants of a humble class by exempting from the landlord's exceptional remedy by distress the tenant's wearing apparel and bedding and the tools of his trade, if together they do not exceed 5*l.* in value. The words of a statute should be construed according to their largest ordinary sense where there is nothing in the occasion on which they are used, or in the context, to restrict them: *Hughes* v. *Overseers of Chatham* (1), per Tindal C.J. The things protected are necessaries of life and their immediate adjuncts. If, in the

Courts Act, 1888 (51 & 52 Vict. c. 43), which by s. 147 enacts: "Every bailiff or officer executing any process of execution issuing out of the Court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure)."

(1) (1843) 5 M. & G. 54, at p. 80.

strict sense of language, the word "bedding" does not include a bedstead, the latter is an adjunct to the former, and the accessories to the thing privileged are themselves privileged. [He also referred to *Wright* v. *Pearson*. (1)]

J. R. Randolph, for the respondent. The magistrate was right. In the proper and ordinary use of language "bedding" does not include a bedstead, and the magistrate has not found that it does. The word "bedding" in standard dictionaries is given a meaning as being something different from "bedstead," and the magistrate's findings of fact in the present case shew that the two things could be used independently. The Act must be construed with reference to the ordinary meaning of the word "bedding."

Foà replied.

CHANNELL J. The question we have to decide is not whether a bedstead is most commonly included in the use of the word "bedding." All must agree, I think, that the word "bedding" is used more often than not as describing something which does not include a bedstead. But the question is, in what sense is the word "bedding" used in the Act? I do not agree with the principle of construction applied by the magistrate—namely, that the section ought to be construed strictly. I do not believe in principles of construction which say that a statute must be construed "strictly" or "liberally." The only question which arises in such a case as this is, on whom does the burden of proof rest—which side has to bring his case within the statute? When learned judges have talked about construing something "strictly" or "liberally" that, I think, is really the test they were applying. I think in the present case it is the tenant who has to bring himself within the section. But all this is only material when you have difficulty in getting at the meaning of the words used. The words used here are, "excepting the wearing apparel and bedding of such person or his family." What is the meaning of "*the* bedding" of the person in question? We are justified, in my opinion, in reading

(1) (1869) L. R. 4 Q. B. 582.

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those words as meaning whatever he has for the purposes of sleeping accommodation. If he sleeps on a mattress laid on the floor, the mattress is his "bedding." If he has a bedstead and mattress, they are his "bedding"; and if his mattress has gone and he sleeps upon the bedstead, that is his "bedding" within the meaning of the Act. That interpretation may, I think, be fairly applied to the tenant's bedstead in the present case, which was protected by the statute from seizure if the bedstead and bedding did not exceed the value of 5*l*. It was a thing used as part of the tenant's sleeping accommodation, and it was, therefore, his "bedding." The case must go back to the magistrate with this intimation of our opinion.

BUCKNILL J. I am of the same opinion.

Case sent back accordingly. Leave to appeal refused.

Solicitors for appellant: *G. Vandamm & Terry.*
Solicitors for respondent: *Pritchard, Englefield & Co.*

W. A.

NORTH EASTERN RAILWAY COMPANY, APPELLANTS *v.* GUARDIANS OF YORK UNION, RESPONDENTS. 1900 *Feb.* 12.

Poor-rate—Separate Assessment of Different Portions of Same Hereditament.

The mere fact that the different portions of one undivided hereditament are capable of commanding rents if let to different occupiers does not impose any obligation upon the rating authority to assess and rate the different portions separately.

Whether for rating purposes a particular area of land is to be treated as one hereditament or as more than one is a question of fact.

CASE stated by an arbitrator.

1. The appellants appealed to the courts of quarter sessions for the West, East, and North Ridings of the county of York and for the city of York against several rates upon property of the appellants in the different parishes comprised in the respondents' union. By an order of a judge, made by consent of all parties, all these appeals were referred to Mr. F. A. Bosanquet, Q.C., as arbitrator upon the terms of an agreement entered into between the appellants and the respondents.

2. By clause 3 of that agreement it was provided that the arbitrator should decide as a preliminary point the following among other questions :—

"(*a*) Whether the appellants are entitled to have the respective portions of their undertaking specified and described in Sched. II. to this agreement separately valued and assessed in the valuation list of the parish or township in which such portions are respectively situate, and to have the said portions separately assessed and rated in and to the rates made for the relief of the poor in such parish or township, and whether the said rates or any and which of them are bad in law because any of such portions is or are not so separately valued, assessed, and rated."

Sched. II. consisted of a list of the various portions of the appellants' undertaking situate in sixteen different parishes, of which the parish of St. Mary, Bishophill Junior, was one.

3. By clause 5 it was provided that the arbitrator after

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giving his decision upon such preliminary points shall, at the request of either of the parties to this agreement and before proceeding further with the arbitration, state the said questions in the form of a special case for the opinion of the Queen's Bench Division of the High Court.

4. Extracts from the rate-books shewing the assessment of the appellants' property in each parish were produced before the arbitrator. For the purposes of this case stated upon the preliminary question specified in clause 3 (*a*) of the agreement and set out in the second paragraph above, it will be sufficient to refer to the assessment in the parish of St. Mary, Bishophill Junior. In that parish the property of the appellants is assessed and rated as a whole at one sum for the gross and one for the net value. In the assessment the property was described as follows:—

Description of Property Rated.	Name or Situation of Property.
Land occupied by line of railway	Main Line.
Land, Offices, Station Buildings, Refreshment Rooms, Sidings, Plant, and Appurtenances.	York Passenger Station.
Land, Signal-box, Sidings, and Appurtenances.	South Points Box.
Land, Ticket Offices, Sidings, and Appurtenances.	Excursion Station.
Land, Offices, Buildings, Shops, Canteen, Engine Sheds, Electric Light Works, Oil Gas Works, Sidings, Plant, and Appurtenances.	York Carriage and Wagon Shops.
Land occupied by line of railway . .	York, Scarborough, and Market Weighton Line.
Land, Hotel, &c.	Station Hotel.

5. The appellants contended that the respondents were bound to assess the property in the following portions as separate hereditaments:—

(1.) Line of Railway.
  (*a*) Running Line.
  (*b*) Sidings.
(2.) York Passenger Station.
(3.) Engine Sheds, South End.
(4.) Engine Sheds, Leeman Road.

(5.) Carriage and Wagon Shops.
(6.) Locomotive Shops.
(7.) Excursion Platform.
(8.) Cattle Dock.
(9.) Pumping Station, Scarborough Bridge.
(10.) Electric Light Works.
(11.) Coal Yard.
(12.) Goods Warehouses.
(13.) Permanent Way Shops.
(14.) Oil Gas Works.
(15.) Hydraulic Pumping Station.
(16.) Hotel and Refreshment Rooms.

6. At the hearing before the arbitrator the respondents admitted that they could and would put a separate value on the hotel and refreshment rooms as a separate item. No question therefore arises with regard to the separate rating of the hotel and refreshment rooms.

7. The property in question comprises the greater part of what is known generally as York Station. The arbitrator heard evidence as to the nature and use of the different parts of the property and had a view of the whole of York Station.

8. Both parties requested him, instead of merely answering the preliminary questions in the affirmative or negative, to state the reasons upon which his decision was based.

9. He accordingly gave his decision in writing on the preliminary questions submitted to him, giving his findings of fact and the reasons on which his decision was based. He thereby decided the question set out in paragraph 2 in favour of the respondents.

10. His findings of fact and view of the case appeared in his written decision, which, so far as related to the question, was as follows :—

"The whole of the premises, including the hotel and refreshment rooms, form one continuous area approached by gates, under the sole control of the railway company, and completely fenced round except where the main lines pass through. There is access from every part to every other part,

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and the whole is closed at night by the locking or watching of the gates, so that none of the public can enter without permission.

"Item 1 in paragraph 5. There is a vast network of railway lines comprising running lines and sidings. Some are clearly through running lines and others are clearly sidings, but with regard to a great part of the lines it would be impossible to say without evidence whether they were running lines or sidings, and it must always be a matter of difficulty and doubt to say where running lines end and sidings begin.

"Item 2. The main running lines of course pass through the passenger station and under the cover of the glazed roof.

"Items 3 to 15. The engine sheds, carriage and wagon shops, locomotive shops, electric light works, and other parts of the property described in items 3 to 15 could be distinguished on a plan or on the ground as separate areas, but they are all served by lines or sidings connected with the rest of the railway, and their use is connected with and auxiliary to the general purposes of the railway company's business.

"The carriage and wagon shops, locomotive shops, pumping station, electric light works, goods warehouses, oil gas works, and hydraulic pumping station might be occupied separately from the railway, and by persons other than the railway company; but in order that this should be done arrangements would have to be made defining the exact limits of the land to be held and the rights to be enjoyed over the surrounding property of the appellants, and providing for rights of access to each of the said portions of the property. As at present laid out, they are only adapted for use by the railway company themselves. The materials and fuel to be used in the different works and shops are placed on the open ground at the side of the neighbouring lines or sidings extending to a greater or less distance according to the amount to be stored from time to time.

"Such being the facts, I am of opinion that the respondents were not bound to treat the several portions of the property above specified as separate hereditaments for the purposes of rating. The statute 6 & 7 Will. 4, c. 96, requires every rate to

be made upon an estimate of the net annual value of the hereditaments rated thereto. Any area of land, however large, held under one title is a hereditament. Any part of that area if dealt with separately from the rest is equally a hereditament, and I can see no reason why any continuous area of land held by one occupier and under one title, and situate in one parish, should not be treated as one hereditament for the purposes of rating, at least so far as the matter depends upon the words of the statute. I take it for granted that in arriving at the rateable value of the property in the parish the valuers will put a value upon each of the separate portions specified in the second schedule, or most of them. But this is not in law necessary. The value of the whole property might be proved against either party by a general admission or agreement.

"None of the cases referred to in the argument seems to me to govern the question. The case of *Mersey Docks* v. *Birkenhead* (1) shews that if warehouses and other premises occupied as part of an unprofitable undertaking could be let to other occupiers and command a rent they may be rated as hereditaments separate from the rest of the estate; but that case is, as it seems to me, no authority for saying that parts of one undivided area, all held together and profitably occupied for the purposes of one undertaking, must be rated as separate hereditaments because they could command rents if let out to other occupiers.

"All the property in the present case is permanently set out for occupation as a whole. I am, therefore, of opinion (the question of separately assessing the hotel and refreshment rooms being got rid of) that the property may properly be rated as a whole."

11. The question for the opinion of the Court is whether the respondents were entitled to assess and rate the whole of the appellants' property in the parish of St. Mary, Bishophill Junior, other than the hotel and refreshment rooms, in one gross sum, or whether they were bound to separately assess and rate the respective portions of the property above described in paragraph 5, or any of those portions.

(1) (1873) L. R. 8 Q. B. 445.

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R. Cunningham Glen (*Balfour Browne, Q.C.*, with him), for the appellants. By the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), poor-rates are to be made on the net annual value of the several hereditaments rated; but no definition of the term hereditament is given in the Act. It is contended that any part of a property or undertaking which is capable of being let to a tenant separately from the remainder is a separate hereditament for the purposes of rating. In *Mersey Docks* v. *Liverpool* (1) it was held that the docks on the two sides of the Mersey were separately rateable although they both belonged to and were occupied by the same body of undertakers. In *Mersey Docks* v. *Birkenhead* (2), where the appellants were occupiers of docks, and of warehouses, workshops, sheds, &c., connected with the docks, it was held that as each of the latter subjects was separately capable of beneficial occupation they were separately rateable, notwithstanding their connection with the docks, which as a whole produced no profit. In *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (3) the House of Lords held that where a dock system extended over more than one parish the rateable value should be assessed upon the parochial and not upon the acreage principle, upon the ground (as stated by Lord Herschell L.C. (4)) that the different parts of the system "are capable of being considered, and their rateable value is certainly capable of conception without any reference to the general undertaking, as a part of which, in fact, they are at present used."

Castle, Q.C., and *Ryde*, for the respondents. The Parochial Assessments Act has now been in force for upwards of sixty years, and this is the first time that the appellants' contention has ever been raised. Whether a particular undertaking consists of one hereditament or of more is in each case a question of fact, and here the arbitrator has found the facts in the respondents' favour. In *Stockport Union* v. *London and North Western Ry. Co.* (5) the Court of Appeal held that whether railway lines were running lines or sidings was a question of

(1) (1872) L. R. 7 Q. B. 643.
(2) L. R. 8 Q. B. 445.
(3) [1895] A. C. 136.
(4) [1895] A. C. at p. 143.
(5) (1898) 67 L. J. (Q.B.) 335.

fact. The object of the appellants is to get discovery of the guardians' evidence, and that they are not entitled to.

Glen, in reply. What the appellants ask for is not discovery of evidence, but better particulars of the assessment.

CHANNELL J. I am of opinion that we must answer the question put to us in this case by saying that the respondents were not bound to separately assess and rate the respective portions of the property described in paragraph 5, and mainly for the reasons given by the arbitrator.

I agree that it is almost entirely a question of fact. If the whole of these different portions of property were one hereditament, they ought to be rated in one lump sum, and whether they are one hereditament or more seems to me to be a question of fact. One thing I think is clear, that property must be rated according to what it is, and not according to what it might be. You may have a thing which, as it is, is one hereditament, but which is quite capable of being made into two. The owner of a field may sell half of it, and it may become two hereditaments in different occupations; but while it is undivided it is one hereditament. The fact that the different portions of the property here are capable of being made separate hereditaments is immaterial. The facts stated by the arbitrator shew that at present they are one, though possibly with some slight alteration they might be made into separate hereditaments. So far as I know, the only exception to the rule that if a given area consists of one hereditament it must be rated in one lump sum is where the entire thing is unprofitable, in which case you may take out part which could be profitably occupied and assess it separately, as is shewn by the case of *Mersey Docks* v. *Birkenhead*. (1)

We are not asked to give any opinion about the hotel and refreshment rooms. If we had to give a decision upon them, I think the matter would be one of greater difficulty. If it is a mere question of fact whether the hotel is to be treated as a separate hereditament from the rest of the station, speaking for myself, I should be inclined to find that it ought to be so

(1) L. R. 8 Q. B. 445.

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treated. In arriving at that conclusion I should be influenced by the fact that the hotel and the rest of the railway station are used for wholly different purposes. It would be like the case of a man occupying two shops, in one of which he carried on one business, and in the other another business.

BUCKNILL J. I concur.

Judgment for the respondents.

Solicitor for appellants: *A. Kaye Butterworth, York.*
Solicitors for respondents: *Ford & Warren, Leeds.*

J. F. C.

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March 8.

[IN THE COURT OF APPEAL.]

ELLIS *v.* ROWBOTHAM.

Apportionment—Rent, Annuities, Dividends, and other Payments in the nature of Income—Landlord and Tenant—Rent payable in Advance—Apportionment on Eviction—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.

The plaintiff let a house to the defendant at a yearly rent payable quarterly in advance. By the terms of the agreement, if the rent should be in arrear for fourteen days, or on breach by the defendant of any of the clauses of the agreement, the plaintiff was to be at liberty to re-enter on giving notice. A quarter's rent being in arrear, the plaintiff gave the required notice, and re-entered. In an action to recover the unpaid rent:—

Held, that the Apportionment Act, 1870, does not apply to rent, annuities, dividends, and other payments in the nature of income, which have accrued due before the happening of the event by reason of which it is proposed to apply the Act; that the Act, therefore, does not apply to rent payable in advance; and that the plaintiff was entitled to recover the whole amount.

APPEAL from a judgment of Kennedy J. at the trial of the action without a jury.

The plaintiff by a written agreement let a house to the defendant for a year from June 10, 1898, at a rental of 357*l.* By the terms of the agreement 189*l.* 5*s.* was to be paid before taking possession, and the sum of 55*l.* 18*s.* 4*d.* on each of the following days, namely, September 10 and December 10 in the year 1898, and March 10, 1899. The agreement contained the

following clause: "If the rent hereby reserved shall be in arrear and unpaid for the space of fourteen days next after any of the days whereon the same ought to be paid as aforesaid or the said premises shall at any time be left vacant for twenty-four hours, or in case of the breach or non-performance of any one or more of the clauses or agreements herein contained then in either of such cases the landlord may, after one week's notice in writing to be signed by himself or his agent to be left on or affixed to the door or some other conspicuous part of the said premises but without any legal process or other formality, retake possession of the said premises or any part thereof in the name of the whole and remove and for ever expel therefrom the said tenant or any person or persons claiming under by or from him and have again repossess and enjoy the same as in his and their first and former estate (anything herein contained to the contrary notwithstanding) but this condition to be without prejudice to other remedies he may have."

The defendant paid the amount due before entry and went into possession, and he also paid the instalment due on September 10, but he did not pay that due on December 10. The plaintiff in February, 1899, brought this action to recover the overdue instalment, and in the same month he gave a written notice to terminate the tenancy as provided for in the agreement, and on March 2, 1899, he re-entered and took possession of the premises.

The defendant paid into court the sum of 15*l.* 14*s.* 5*d.*, calculated on the basis of the rent agreed on being taken as accruing due from day to day, so that the amount due would be the difference between the rent, calculated on that basis, between June 10, 1898, and March 2, 1899, and the sum actually paid by the defendant.

The learned judge gave judgment for the plaintiff.

The defendant appealed.

C. A. Russell, Q.C. (with him *F. Dodd*), for the defendant. By the common law, where a tenant agreed to pay rent quarterly at the end of each quarter, and the landlord entered

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into possession during a quarter, he did so subject to the loss of the rent for that quarter. Now, under the Apportionment Act, 1870, he can recover an apportioned sum. Conversely, the tenant is only bound to pay the apportioned sum. The Act applies expressly by s. 2 to "all rents," and declares that they are apportionable. The house was let for a year, and the rent must be taken to accrue from day to day. The time at which the rent is payable, whether at the beginning or at the end of a quarter, cannot affect the generality of the words "all rent." Sect. 3 says that the apportioned part of rent is to be payable when the next entire portion shall have become due. That would prevent the tenant being obliged to pay a part of his rent at an earlier date than that at which it would otherwise have been payable; but the section has no bearing on the present case. This is not like the case of an annuity payable in advance, because in that case there is no question of consideration. Here there has been a partial failure of consideration, and the lessor is not entitled to the whole quarter's rent. He had the right of re-entry, and that right was without prejudice to his other remedies; but his other remedy was to sue for an apportioned part of the entire rent, and his right to do so is admitted by the payment into court. No doubt the argument must go to the length of saying that, if the landlord had received his rent and ejected the tenant for some other breach of covenant during the quarter, the tenant could recover back part of the rent; but there would be no injustice in such a case, for the landlord would get rent up to the time at which he got possession, and cannot complain that he does not get rent for the period during which he is in possession.

Rawlinson, Q.C., and *Woodfin*, for the plaintiff, were not called on.

A. L. SMITH L.J. This is an appeal from a judgment of my brother Kennedy which in my opinion must be supported. The case is that a landlord let his house to the defendant for a year at a rental of 357*l.* in all, which was to be payable in advance in certain instalments at certain dates. The defendant

covenanted to pay at those dates, and there was also an express and independent stipulation to the effect that if the rent was in arrear for fourteen days after it was due, or in case the premises were left vacant for twenty-four hours, or in case of breach of any of the clauses of the agreement, the landlord on giving a week's notice might re-enter, and this condition was to be without prejudice to other remedies he might have.

The obvious meaning of the agreement is that the landlord was to be secured as to the payment of rent by its being made payable in advance in the proportion and at the dates mentioned. On December 10, 1898, an instalment was due which the defendant did not pay. The landlord thereupon did that which the agreement permitted him to do—that is, he re-entered and took possession, and then he resorted to his other remedy and sued for the overdue rent. The tenant sets up that he is at liberty to break his contract and to decline to pay the rent which he contracted to pay on December 10. This result is said to be brought about by the Apportionment Act, 1870. It is common knowledge that, apart from statute, where a tenant was evicted before the last day of the term at which time the rent was due, the landlord got nothing in respect of the rent for that term. Now, however, the landlord can recover an apportioned part of the rent for the time during which the tenant occupied. How does that apply to this case, in which the rent was due long before the need to have recourse to the Apportionment Act could arise? By s. 2 of that Act all rents are to be considered as accruing from day to day; but in my opinion that provision cannot apply to rent which has accrued before the tenant went out of possession.

The appeal must be dismissed.

COLLINS L.J. I cannot say that I am altogether free from doubt in this matter. I see great weight in the argument that has been addressed to us, but I do not dissent from the decision arrived at by the other members of the Court.

ROMER L.J. Looking at the wording of the Apportionment Act, especially the wording and provisions of ss. 2, 3, and 4, I

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Romer L.J.

think that the Act is only intended to apply to sums which are accruing but have not accrued due at the time when the apportionment is said to be required. The Act does not, in my opinion, apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment. To hold otherwise would lead to extraordinary results, some of which were pointed out in the course of the argument—results not, in my opinion, contemplated by the Legislature—and would also put a forced and, in my opinion, unsound construction upon the Act.

With regard to the special circumstances of the case now on appeal, I need only say that, in my opinion, the landlord was entitled by the terms of his contract to retain rent paid in advance although subsequently to the receipt of the rent he became entitled to re-enter and did so.

Appeal dismissed.

Solicitor for plaintiff: *C. D. Travers Wire.*
Solicitor for defendant: *George Trenam.*

A. M.

C. A. 1900 *March* 9.

[IN THE COURT OF APPEAL.]

BURGE *v.* ASHLEY & SMITH, LIMITED.

Gaming—Agreement by Way of Wagering—Recovery of Deposit from Stakeholder—Gaming Act, 1845 (8 & 9 *Vict. c.* 109)—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

The Gaming Act, 1892, s. 1, does not prevent the recovery by the depositor from the stakeholder of money deposited to abide the event of a wager.

O'Sullivan v. *Thomas*, [1895] 1 Q. B. 698, approved of.

APPEAL from the judgment of Lawrance J. in an action tried by him without a jury.

The action was to recover money deposited by the plaintiff with the defendants, who were the proprietors of the *Sportsman* newspaper, to abide the event of a boxing match with gloves between the plaintiff and a man named Dobbs. The match

being for 300*l.* a side, the plaintiff and Dobbs had each deposited that sum with the defendants as stakeholders. The match was won by Dobbs. Subsequently, but before the stakes were paid over to Dobbs, the plaintiff gave notice to the defendants not to pay over the 300*l.* which he had deposited, but to pay it back to him. The defendants notwithstanding the notice handed the stakes over to Dobbs. The plaintiff thereupon brought this action. The defendants contended that by reason of the provisions of the Gaming Act, 1892, the action was not maintainable. The learned judge held that the decision in *O'Sullivan* v. *Thomas* (1) was conclusive in the plaintiff's favour, and therefore gave judgment for the plaintiff for the amount claimed.

Duke, *Q.C.*, and *W. Ellis Hill*, for the defendants. Such an action as this was no doubt maintainable prior to the Gaming Act, 1892: see *Varney* v. *Hickman* (2); *Diggle* v. *Higgs* (3); *Hampden* v. *Walsh* (4); *Hastelow* v. *Jackson*. (5) In *Diggle* v. *Higgs* (3) Cockburn C.J. said that, apart from authority, he should have been disposed to come to the conclusion that the Gaming Act, 1845, was intended to prevent any action whatever in respect of money deposited to abide the event of a wager. It is submitted that that is what the Legislature intended in passing the Gaming Act, 1892. The words of the 1st section of that Act clearly are wide enough to cover the case. This action is brought on an implied promise to pay to the plaintiff a sum of money paid by him in respect of a contract rendered null and void by the Gaming Act, 1845; and therefore it comes exactly within the words of the Act. It would likewise come within the second branch of the section as being an action on an implied promise to pay a sum of money in respect of such a contract. In *O'Sullivan* v. *Thomas* (1) Wills and Wright JJ. held in a case similar to the present that the action would lie notwithstanding the provisions of the Gaming Act, 1892, on the ground that the

(1) [1895] 1 Q. B. 698.
(2) (1847) 5 C. B. 271.
(3) (1877) 2 Ex. D. 422.
(4) (1876) 1 Q. B. D. 189.
(5) (1828) 8 B. & C. 221; 32 R. R. 369.

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word "paid" in s. 1 of the Act meant "paid out and out," and therefore was not applicable to a sum of money deposited with a stakeholder. It is submitted, however, that the word ought not to be so construed. A sum deposited with a stakeholder is "paid" to him upon a trust. The primary meaning of the word "paid" covers it, and in many cases money so deposited has been spoken of as "paid" to the stakeholder: see per Chitty L.J. in *Carney* v. *Plimmer*. (1) That case is not exactly in point, but it goes a good way to support the defendants' contention. It has been suggested that the Gaming Act, 1892, was passed to reverse the law as laid down in *Read* v. *Anderson*. (2) That may be, but it is contended that it has a wider effect, and was intended to provide generally that no action to recover money whatever should lie in respect of wagering transactions.

[They also cited *Shoolbred* v. *Roberts*. (3)]

Ashworth Harrison (*Marshall Hall, Q.C.* with him), for the plaintiff, was stopped.

A. L. SMITH L.J. This is an appeal from the judgment of Lawrance J., who decided this case in favour of the plaintiff upon the authority of *O'Sullivan* v. *Thomas* (4), and the question therefore really is whether that case was rightly decided. The question raised is whether the Gaming Act, 1892, prevents an action from being maintained by a depositor to recover from a stakeholder money deposited with him to abide the event of a wager in circumstances in which it would otherwise have been maintainable. The answer to that question depends upon whether money so deposited, in accordance with the well-known practice with regard to wagers, can be said to be "paid" within the meaning of s. 1 of the Act. In ordinary parlance I should not think that a person so depositing a sum of money with a stakeholder would say that he had "paid" it to the stakeholder. In the case of *Strachan* v. *Universal Stock Exchange* (5) the decisions with regard to the effect of the

(1) [1897] 1 Q. B. 634.
(2) (1884) 13 Q. B. D. 779.
(3) [1899] 2 Q. B. 560.
(4) [1895] 1 Q. B. 698.
(5) [1895] 2 Q. B. 697.

Gaming Act, 1845, in such a case as this were discussed. In that case I said, summing up the result of those decisions: "It is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void; but it has been held by authorities, which it is far too late now to question, that, as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter 'to abide the event on which any wager shall have been made'; and any money still in the latter's hands unappropriated by him becomes money of the former without any good reason for the latter detaining it; and in such circumstances an action for money had and received to the plaintiff's use will lie. This was held as long ago as the year 1828 by the King's Bench in *Hastelow* v. *Jackson* (1); again in 1847, by the Common Pleas in *Varney* v. *Hickman* (2), followed by *Hampden* v. *Walsh* (3) in 1876, and adopted in 1879 by the Privy Council in *Trimble* v. *Hill* (4)." The question is whether the Act of 1892 has altered the law as laid down by those decisions. The Gaming Act, 1892, s. 1, provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." I do not think that this case can be brought within either branch of that section. In my opinion a sum of money deposited with a stakeholder, as in the present case, is not "paid" within the meaning of the section, and I think it would be stretching the language of the Act to make it apply to a sum so deposited. It would be a very strange thing, if it were intended by the Legislature to deal with such a notorious practice as that of depositing

(1) 8 B. & C. 221.
(2) 5 C. B. 271.
(3) 1 Q. B. D. 189.
(4) (1879) 5 App. Cas. 342.

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stakes with a stakeholder, especially having regard to the decisions to which I have alluded, that plain words should not have been used to meet the case. The words of the Gaming Act, 1892, do not appear to me apt words for that purpose.

I now come to the authorities on the point. The case of *O'Sullivan* v. *Thomas* (1) raised exactly the same point as the present case. In giving judgment Wills J. said: "In my opinion an action will lie; we must give to the word 'paid' its primâ facie meaning of paid out and out: I do not think that it is properly applicable to money deposited for the purpose of paying a third party." I think the view so expressed was correct. Our attention was called to the case of *Carney* v. *Plimmer* (2), decided in this Court. That was not a decision on the point raised in this case, but some expressions used by Chitty L.J. in giving judgment were relied on for the defendants. That was not the case of an action brought to recover money deposited from a stakeholder. It was an action brought to recover money advanced by the plaintiff as the defendant's share of the stakes to be deposited with a stakeholder to abide the event of a boxing match between the defendant and another man, and which was only to be repaid by the defendant if he received the stakes, which he did. The question was whether that did not come directly within the words of the Act. Lord Esher M.R. said: "That this loan was in respect of a matter rendered null and void by the Act of 1845 I cannot doubt, because the plaintiff's own evidence is that he lent the money on the terms that if the defendant won he was to repay it, but that, if he lost, he was to be under no obligation to do so, so that the plaintiff was to be repaid or not according to the result of the wager." Lopes L.J. said substantially the same thing. It seems to me that their judgments were perfectly right. Chitty L.J. said: "Looking at the terms on which the plaintiff paid the 500*l.* to the stakeholder, it appears that the money was to be repaid by the defendant, if he received the stakes from the stakeholder. In that event, and in that only, was the money to be repaid, and the contract was therefore not a simple contract for a loan. Put in a legal form, the contract may be

(1) [1895] 1 Q. B. 698. (2) [1897] 1 Q. B. 634.

thus stated: Money was paid by the plaintiff to the stakeholder at the request of the defendant, and on the terms that the defendant should repay it if and when he received it." With all respect for anything said by the learned Lord Justice, I do not think that, strictly speaking, the sum of 500*l.* was "paid" to the stakeholder. It was advanced by the plaintiff in order that the defendant's share of the stakes might be deposited with the stakeholder. The question in that action was, not whether the stakeholder, but whether the defendant could be made to pay it back. The language of Chitty L.J. was not, I think, directed to the point now before us. It is obvious that there is a great distinction between *Carney* v. *Plimmer* (1) and the present case. In that case the repayment of the money to the plaintiff depended on the event of the wager, and therefore it plainly could not be recovered by action. It is clear that the judges in that case were not thinking of the point raised in the present case from the fact that, though *O'Sullivan* v. *Thomas* (2) was cited in the argument, not one of the learned Lords Justices seem to have thought it applicable to the case before them, for it is not once referred to in the judgments. In my opinion *Carney* v. *Plimmer* (1) is not in point, and what was decided there in no way concludes the question we have to decide. For these reasons I think that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. This case is virtually an appeal from the decision in *O'Sullivan* v. *Thomas*. (2) The question raised is whether the Gaming Act, 1892, has in effect substituted new law for the law which previously existed by virtue of the interpretation given by the decisions to the Gaming Act, 1845. It was well settled under that Act that a person who had deposited money with a stakeholder to abide the event of a wager could recover it, if he claimed it back at any time before it was actually paid over by the stakeholder. It is suggested that the Gaming Act, 1892, has altered that state of the law, and that the effect of it is that the depositor cannot now recover the money deposited by him from the

(1) [1897] 1 Q. B. 634. (2) [1895] 1 Q. B. 698.

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stakeholder. Certainly the defendants' counsel had a good deal to say with regard to the capability of the words of the Act to cover the present case. He said that the money sought to be recovered was money "paid" by the plaintiff to the stakeholder, and unquestionably it did pass from the pocket of the depositor into the pocket of the stakeholder. He further said that, if so paid, it was clearly paid "in respect of a contract rendered null and void by the Act 8 & 9 Vict. c. 109"; and that the action was therefore on an implied promise to pay a sum of money paid in respect of such a contract, and so came within the words of the Act. I agree that the words looked at by themselves might cover the case. But I think we have to consider something more than the mere words. The Act was passed after a long chain of authorities establishing the proposition that a sum deposited as in the present case might be recovered. If it had been intended to alter the law as established by those decisions, I should have expected to find a clear expression of that intention, which I do not find in this Act. The words may be capable of covering the case, but they are not in my opinion apt words for the purpose. Furthermore I cannot shut my eyes to the fact that this Act was passed not long after the decision in *Read* v. *Anderson* (1) and was obviously intended to meet that case. *Read* v. *Anderson* (1) was a case in which money was "paid" in the full sense of the term in respect of a wagering contract void under the Act of 1845. In view of the fact that the Gaming Act, 1892, was clearly passed to deal with such cases, namely, cases in which an action is brought upon an express or implied promise to repay money "paid" in the full sense of the term in respect of a wagering contract, and, having regard to the long series of previous decisions with respect to money deposited with a stakeholder, I cannot escape from the conclusion that the Act of 1892 was passed alio intuitu, and not in relation to the question raised in the present case. I agree with the reasoning of Wills J. in *O'Sullivan* v. *Thomas*. (2) I think that the word "paid" in the connection in which it is used by the Act of 1892, and having regard to the stage in the

(1) 13 Q. B. D. 779. (2) [1895] 1 Q. B. 698.

history of the law at which it was so used, ought not, upon the true construction of the Act, to be read as covering a deposit such as this, i.e., a sum handed to a person with a mandate that in a particular event it is to be paid to a particular person.

ROMER L.J. I agree. As the law stood just before the passing of the Gaming Act, 1892, if a person deposited a sum of money with a stakeholder to abide the event of a wager, he had a right at any moment to require it to be handed back to him, so long as it had not been paid over upon the event of the wager. So that a person so depositing money was at law precisely in the position of a person who has deposited money with an agent, giving him a mandate in a certain future event to deal with the money in a certain way, and who would have the right before the mandate has been acted upon to call upon the agent to return the money. That being the state of the law, it appears to me that a sum so deposited could not properly be described as "paid" to the stakeholder. Therefore, when we come to the Act of 1892, I think it is reasonably clear that the Legislature could not have intended by the words "money paid" to describe a deposit of this kind. I agree with the decision in *O'Sullivan* v. *Thomas* (1), and the reasons given for it by Wills and Wright JJ. With regard to the case of *Carney* v. *Plimmer* (2), I agree with what has been said by A. L. Smith L.J. In that case the plaintiff did, so far as he was concerned, "pay" the sum which was placed in the hands of the stakeholder. He paid the money on behalf of another, and after payment the money ceased to be his, and he could not have recovered it back as a deposit. Therefore that case is altogether distinguishable from the present.

Appeal dismissed.

Solicitors for plaintiff: *Bernard Abrahams & Co.*

Solicitors for defendants: *Gush, Phillips, Walters & Williams.*

(1) [1895] 1 Q. B. 698. (2) [1897] 1 Q. B. 634.

E. L.

C. A.
1900
March 13.

[IN THE COURT OF APPEAL.]

HICKMAN *v.* MAISEY.

Highway—Trespass to Land—Use of Highway otherwise than as such.

The plaintiff was possessed of land which was crossed by a highway. A trainer of race-horses had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was one of the proprietors of a publication which gave accounts of the doings of race-horses in training. On the occasion in respect of which the action was brought he walked backwards and forwards on a portion of the highway on the plaintiff's land about fifteen yards in length for a period of about an hour and a half, watching and taking notes of the trials of race-horses on the plaintiff's land. The plaintiff having brought an action of trespass against him in respect of his user of the highway as aforesaid, and the jury having found for the plaintiff:—

Held, that the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public are entitled, and he therefore was guilty of a trespass on the plaintiff's land.

Harrison v. *Duke of Rutland*, [1893] 1 Q. B. 142, followed.

Application by the defendant for judgment or a new trial in an action for trespass to land tried before Day J. and a jury.

The plaintiff was the owner and occupier of land on the Wiltshire downs which was crossed by a highway. A trainer of race-horses had for valuable consideration agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was one of the proprietors of a publication which gave accounts of the doings of race-horses in training. He was in the habit of frequenting the before-mentioned highway for the purpose of watching the trials of horses on the plaintiff's land. It appeared that the trainer objected to this, and notice was therefore given by the plaintiff to the defendant to discontinue using the highway for that purpose, but he refused to do so. On the occasion in respect of which the action was brought the defendant walked backwards and forwards on a portion of the highway, the soil

of which was vested in the plaintiff, about fifteen yards in length for a period of about an hour and a half, observing with glasses, and taking notes of, the trials of horses on the plaintiff's land. The action was thereupon brought claiming damages for trespass, and an injunction to restrain the defendant from repetition of the acts complained of. Day J. directed the jury in effect that the defendant was entitled as one of the public to use the road for the purpose of passing and repassing as a wayfarer, but not to frequent or stop upon it for the purpose of carrying on his business upon it by watching the trials of horses on the plaintiff's land; and he left it to the jury to say upon the evidence whether the defendant had used the highway for passing and repassing as a wayfarer, in which case their verdict should be for the defendant, or had exceeded the reasonable use of it for that purpose and had used it for the purpose of carrying on his business thereon, in which case the defendant would be guilty of a trespass, and their verdict should be for the plaintiff. The jury found a verdict for the plaintiff, damages 1*s.*, and the learned judge gave judgment accordingly and granted an injunction.

Duke, Q.C., and *J. W. McCarthy* (*T. H. Parr* with them), for the defendant. The defendant, as a member of the public, had a right to pass and repass along the highway or any part thereof as often as he pleased. The law cannot inquire with what intention or object a person passes along the highway so long as he does not, subsequently to going upon the highway, commit thereon any act of trespass or unlawful interference with the rights of the owner of the land over which the highway passes. If he does such an act, then, on the principle laid down in the *Six Carpenters' Case* (1), it may be that the inference will arise that his original entry on the soil of the highway was with an unlawful intention, and therefore a trespass. The case of *Reg.* v. *Pratt* (2) was such a case. Here the defendant committed no such act of trespass or unlawful interference with the plaintiff's rights after he got on the highway. He only passed and repassed along the highway, as he

(1) (Mich. 8, James I.) 8 Rep. 146 a. (2) (1855) 4 E. & B. 860.

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was entitled to do, and there was nothing unlawful in his looking at the trials of the horses as he passed. Could it be said that, if the intention with which a man walked along a highway was that of looking at the scenery visible therefrom, he would not be using it for the purpose of passage only, and therefore his entry upon it would become a trespass? Would it be a trespass if one of the public took a sketch from a highway? The case of *Harrison* v. *Duke of Rutland* (1) is distinguishable from the present case. There the plaintiff used the highway solely for the purpose of actively interfering therefrom with the defendant's lawful enjoyment of his rights over his adjoining land. At what point can it be said that the presence of the defendant in this case on the highway became unlawful and a trespass? His original entry was no trespass: he had a right as one of the public to walk along the highway to the furthest point to which he went, and, after he had entered, he did no legal injury to the plaintiff. If people stand in a street to see a procession pass, they do not commit a trespass. The judge did not properly direct the jury, for his direction imported that, if the defendant went on the highway to carry on his business, it was a trespass. That cannot be the test. A carrier carries on his business on the highway.

[They also cited *Dovaston* v. *Payne* (2); *Shorland* v. *Govett* (3); *Rangeley* v. *Midland Ry. Co.* (4)]

Foote, Q.C., and *F. R. Y. Radcliffe*, for the plaintiff, were not called upon.

A. L. SMITH L.J. This is an application for judgment or a new trial by the defendant in an action for trespass brought by the occupier of certain down land, part of which was used for the purpose of training race-horses. The application is made under the following circumstances. It appears that there is a highway across the plaintiff's land, and the defendant, who was what has been called a "racing tout," had for a considerable period of time been using this highway for the purpose of

(1) [1893] 1 Q. B. 142.
(2) (1795) 2 H. Bl. 527.
(3) (1826) 5 B. & C. 485; 29 R. R. 294.
(4) (1868) L. R. 3 Ch. 306.

watching therefrom the trials of race-horses upon the plaintiff's land, and availing himself of the information so obtained by him for the purposes of his business, the effect of which was to depreciate the value of the plaintiff's land as a place for the training and trial of race-horses. The defendant insisting on his right so to use the highway, the plaintiff brought his action for trespass in respect of such use of the highway by the defendant. The defendant justifies the acts complained of on the ground that the locus in quo was a highway, and that he was lawfully using it as such. The question is, therefore, whether the use of the highway in the manner in which the defendant used it was in truth a use of it for the purpose for which a highway is dedicated to the public. The evidence shews that what the defendant did was to walk up and down a short portion of the highway about fifteen yards in length for a period of about an hour and a half with a note-book, watching the horses, and taking notes of their performances. It is contended for the defendant that such a use of the highway is lawful as being a use of it in the ordinary way in which a highway is used, namely, for the purpose of passing and repassing, and therefore not a trespass. Unless what the defendant did comes within the ordinary and reasonable use of a highway as such and is therefore lawful, it is clear that it would be a trespass. Therefore the question is, What is the lawful use of a highway? Many authorities, of which the well-known case of *Dovaston* v. *Payne* (1) is one, shew that primâ facie the right of the public is merely to pass and repass along the highway; but I quite agree with what Lord Esher M.R. said in *Harrison* v. *Duke of Rutland* (2), though I think it is a slight extension of the rule as previously stated, namely, that, though highways are dedicated primâ facie for the purpose of passage, "things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such"; and, "if a person on a highway does not transgress such reasonable and usual mode of using it," he will not be a trespasser; but, if he does "acts other than the reasonable and ordinary user of a highway as

(1) 2 H. Bl. 527. (2) [1893] 1 Q. B. 142.

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such" he will be a trespasser. For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, to take a case suggested during the argument, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass. But I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned. It appears to me that in the case of *Harrison* v. *Duke of Rutland* (1) the point which arises in this case was substantially determined, though the user of the highway by the plaintiff in that case was not precisely similar to that in the present case. In that case the plaintiff went upon a highway, the soil of which was vested in the defendant, while a grouse drive was taking place on adjoining land of the defendant, for the purpose of interfering with the drive, which the defendant's keepers prevented him from doing by force. The plaintiff thereupon brought an action for assault against the defendant, and the defendant counter-claimed in trespass. The plaintiff in answer to the counter-claim set up the defence that the locus in quo was a highway. It was clear upon the facts that he was not using the highway for the purpose of passing or repassing along it, but solely for the purpose of interfering with the defendant's enjoyment of his right of shooting over his land, and it was held therefore that the plaintiff's user of the highway was a trespass. I cannot see any real distinction between that case and the present. It is contended that Day J. directed the jury improperly, but I do not think that is so. He told them in effect that the defendant was entitled to use the highway as a wayfarer, and that it was a question for them whether in what the defendant did he was so using it. I think that his direction was in substance a sufficient direction under the

(1) [1893] 1 Q. B. 142.

circumstances of the case. I do not agree with the argument of the defendant's counsel to the effect that the intention and object of the defendant in going upon the highway cannot be taken into account in determining whether he was using it in a lawful manner. I think that his intention and object were all-important in determining that question. The application must be dismissed.

COLLINS L.J. I am of the same opinion. It is not very easy to draw an exact line between the legitimate user of a highway as a highway and user which goes beyond the right conferred upon the public by its dedication. But, as in many other cases, it is not difficult to put cases well on one side of the line or the other. It seems to me that the user by the defendant in the present case comes well outside the line of that which constitutes the legitimate and reasonable user of a highway as a highway. I agree with the contention of the defendant's counsel that, if it be intended to question whether a person entering, as the defendant did, upon land subject to a public right of way, entered in the exercise of that right, it must be shewn that he subsequently committed some act thereon which, being a trespass or unlawful, affords a ground for the inference that his original entry was for the purpose of committing that unlawful act, and therefore was itself a trespass. Accepting that proposition as true, I think that it does not help the defendant and that the evidence in this case shews that he committed a trespass. The question must in the last resort be whether what the defendant did after he got upon the highway comes within the ordinary and reasonable use of a highway as a highway, that is, for the purpose for which it is dedicated to the public. Now primarily the purpose for which a highway is dedicated is that of passage, as is shewn by the case of *Dovaston* v. *Payne* (1); and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities shew that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those

(1) 2 H. Bl. 527.

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reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. This is in effect what Lord Esher M.R. said in *Harrison* v. *Duke of Rutland*. (1) He there said: "Highways are no doubt dedicated primâ facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." The defendant's counsel contended that the law could not inquire into the motive with which a person went upon the highway. But that contention appears to me to be contrary to all the leading authorities on the matter from Lord Coke's time downwards. If a person is found using a highway in a manner which is altogether outside the purpose for which it was dedicated, that raises the question with what intention he went on the highway; for the law judges by his subsequent action what his original intent was. The defendant's counsel said that there was nothing amounting to a subsequent trespass on the part of the defendant from which it could be inferred that his original entry was unlawful; and for that he cited the case of *Shorland* v. *Govett*. (2) But that case, when it comes to be scrutinized, does not help him. It was the case of a demurrer to a replication. The action was for breaking and entering the plaintiff's house, and remaining there till the plaintiff paid the defendant a large sum of money. The defendant justified under a fi. fa. The replication was that, before the writ was fully executed, the defendant extortionately demanded and received 3*l*. 10*s*. more than he was entitled to levy under the fi. fa. It was pointed out by the judges that the mere demand of a larger amount than was due would not make the entry a trespass; but one, if not more of them, seems to have said in

(1) [1893] 1 Q. B. 142. (2) 5 B. & C. 485; 29 R. R. 294.

effect that the replication did not shew that the defendant had remained in possession any longer than he was entitled to do; but that, if it had shewn that, there might have been a trespass after the original entry, which would have entitled the Court to treat that entry as a trespass. Here we have what we are justified in treating as an illegitimate use of the highway, as being a use of it for too long a period and wholly disconnected with the purpose of passage, and, that being so, we are entitled to consider quo animo the defendant originally went on the highway. It appears to me that the facts shew that he originally went upon it for the purpose of carrying on his business as a racing tout, and not for the legitimate use of it as a highway.

ROMER L.J. I agree. I do not think that this case can really be distinguished from *Harrison* v. *Duke of Rutland*. (1) What the defendant did in the present case amounted in my opinion to an interference with the plaintiff's rightful exercise of ownership over his adjoining land by using it as a place for the training and trial of race-horses. No doubt, if what the defendant did had been done by him on soil which was not vested in the plaintiff, the latter would have had no legal right to complain; but, the soil of the highway belonging to the plaintiff, he has a right to ask for what purpose the defendant entered on it: whether for the purpose of using it in the ordinary and reasonable way in which a highway may be used, or for the purpose of doing that which amounted to an interference with the plaintiff's legal use of his own land. It seems to me that upon the facts of this case the defendant went upon the highway for the latter purpose. That being so, the case appears to me clearly to fall within the decision in *Harrison* v. *Duke of Rutland*. (1) The essence of that decision seems to be contained in what was said by Lord Esher M.R. (2) He there says: "But the plaintiff in this case, it should be observed, was doing that which comes within what Lord Campbell C.J. said in *Reg.* v. *Pratt* (3)—he was using this part of the highway

(1) [1893] 1 Q. B. 142. (2) [1893] 1 Q. B. at p. 147.
(3) 4 E. & B. 860.

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solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land." Lopes L.J. put the case in substance in the same way. I do not see any substantial distinction between that case and the present.

Application refused.

Solicitors for plaintiff: *Goodale & Hobson, for Butterworth, Rose & Morrison, Swindon.*

Solicitors for defendant: *Prior, Church & Adams, for A. E. Withy, New Swindon.*

E. L.

C. A. 1900 *March* 22.

[IN THE COURT OF APPEAL.]

WILLIAMS, APPELLANT; LONDON AND NORTH WESTERN RAILWAY COMPANY, RESPONDENTS.

Railway—Rates—Exemptions—Land used as Railway for Public Conveyance—Liverpool Corporation Act, 1893 (56 & 57 *Vict. c. clxxxi.*) (*Local*), *s.* 36 (*ii.*).

The Liverpool Corporation Act, 1893, s. 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance" shall be rated in respect of the same to the general rate leviable by the corporation in any greater proportion than one-fourth part of the net annual value. A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed, open on one side; and, on the other, with openings in the walls to admit trucks. Inside the shed were a number of railway lines, comprising sidings, and running alongside platforms, for the purpose of loading and unloading railway trucks with goods. All these lines were used for the conveyance of any goods sent by the public to or from the premises. The premises were some distance from the company's main line, and were connected therewith by a dock line belonging to the Mersey Docks and Harbour Board, who under statutory powers permitted the company to use such line, and by a tramway laid across a street by the company under a licence granted by the corporation under statutory powers. The company's premises were acquired and laid out under powers conferred upon them by a private Act:—

Held, that the land used for the lines, sidings, and platforms inside the company's premises was not land "used as a railway made under the powers of an Act of Parliament for public conveyance" within the

meaning of s. 36 of the Liverpool Corporation Act, 1893, and that the company were not entitled, with regard to those premises, to the partial exemption in respect of rating contained in that section.

Judgment of the Queen's Bench Division, [1899] 2 Q. B. 197, reversed.

APPEAL from a judgment of the Queen's Bench Division, reported [1899] 2 Q. B. 197, upon a case stated by a justice of the peace for the city of Liverpool.

An information was preferred by the appellant, a collector of rates for the mayor, aldermen, and citizens of the city, alleging that the respondents had not, for the space of fourteen days after demand in writing by the appellant, paid the sum of 109*l.*, being the amount due from them in respect of a rate, called the "general rate," made for the city, and levied upon the respondents in respect of certain premises in their occupation described in the information as "goods station in Sefton Street."

The information was laid and the summons issued under s. 29 of the Liverpool Improvement Act, 1858 (21 & 22 Vict. c. lxxx.) (Local), incorporated in the Liverpool Corporation Act, 1893.

The following material facts were proved or admitted at the hearing before the magistrate:—

In February, 1898, the mayor and corporation of the city of Liverpool, acting under the powers conferred upon them by the Liverpool Corporation Act, 1893 (1), levied a general rate

(1) By ss. 34 and 35 of this Act, (56 & 57 Vict. c. clxxxi.) (Local), the corporation are authorized to levy a general rate.

Sect. 36: "The general rate shall be levied on the net annual value of all property for the time being assessed to the relief of the poor and included in the valuation lists of the different parishes in the city in force at the time of the levying of the rate with such additions as may be lawfully made under this Act. Provided that . . . .

"(ii.) No person occupying land used as arable meadow or pasture ground or orchards or allotments only or as woodland market garden or nursery ground or any land covered with water and used only as a dock or a canal or the towing-path thereof or as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same to the general rate in any greater proportion than one-fourth part of the net annual value thereof."

[Sect. 211, sub-s. 1 (*b*), of the Public Health Act, 1875 (38 & 39 Vict. c. 55), contains an exemption similar to that

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upon the premises in question, of which the respondents were and are the owners and occupiers, described as "warehouses and shed," and assessed at their net annual value.

The premises in question are known as the "Brunswick Docks Goods Station," and are situated in Sefton Street, in the city of Liverpool. They consist of a substantial erection comprising a covered shed open at one side—namely, the side furthest from Sefton Street. The elevation to Sefton Street is very substantially built with large openings in the wall, which are used for the purposes of admitting both railway wagons, carts, and lorries. These openings can be closed when necessary by sliding gates. Inside the walls there are a number of railway lines, comprising sidings, and running alongside platforms which are used for the purpose of loading or unloading railway wagons with goods. There are also turntables, cranes, a weigh-bridge and small offices. There is also in this inclosure some land upon which nothing is erected, but which is used for carts and lorries for bringing goods to and taking them from the premises.

The premises are situated a little over half a mile from the main line of the company—namely, the Wapping Goods Station. They are, however, connected with the main line of the company at the Wapping Goods Station, and with their several goods stations along the line of docks, by permission having been given to the respondents by the Mersey Docks and Harbour Board to use the Board's dock railway, and also by the Liverpool Corporation having granted a licence to the respondents for a tramway, to be laid across Sefton Street, to connect the premises with the dock rails which run at the side of Sefton Street opposite to the premises. Goods are taken to the premises and brought from them to the main line of the company in railway wagons drawn by locomotives.

The dock line of rails along Sefton Street was constructed by the Mersey Docks and Harbour Board under s. 72 of the

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in s. 36 (ii.) of the Liverpool Corporation Act, 1893, in respect of the assessment to any district rate of "land used as a railway constructed under the powers of any Act of Parliament for public conveyance."]

Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.) (Local). The permission granted to the company by the corporation to lay rails across Sefton Street was granted by the corporation under the powers conferred upon them by s. 100 of the Liverpool Improvement and Waterworks Act, 1871 (34 & 35 Vict. c. clxxxiv.) (Local), which enables the corporation to grant to the owner of premises abutting on a street a licence to use a way by means (inter alia) of a tramway across such street, upon specified terms and conditions. The licence was granted by deed. The respondents agreed to pay the corporation 2*l.* 12*s.* per annum for the privilege acquired, and the licence was determinable by one month's notice on either side.

All the lines of rails in the premises in question are used for the conveyance of any goods which the public send by rail to or from the premises in question. The premises in question were constructed by the respondents upon land acquired by them under powers conferred upon them by s. 20 of the London and North Western Railway Act, 1896 (1), which incorporates s. 3 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

The magistrate was of opinion that the premises were part of the railway system of the respondents, and that such portion thereof as consisted of railway lines, turntables, sidings, and platforms, together with the portion of the roof covering the same, came within the terms of the partial exemption, contained in s. 36 of the Liverpool Corporation Act, 1893, in respect of "land used as a railway made under the powers of an Act of Parliament for public conveyance," and that the

(1) 59 & 60 Vict. c. cxlix. (Local), s. 20: "Subject to the provisions of this Act . . . . the company may from time to time enter upon, take, use, and appropriate for the purpose of extending the stations, sidings, warehouses, coal wharves, depots, and other accommodation of the company for mineral goods and cattle traffic, and for other purposes connected with their undertaking, the lands hereinafter described . . . . and may execute the works and exercise the powers hereinafter mentioned and so far as such works are shewn upon the deposited plans and sections in accordance with those plans and sections."

[The lands thereinafter described included the land upon which the Brunswick Docks Goods Station was built.]

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respondents should be rated in respect of such portions on one-fourth part of the net annual value thereof, and that as regarded the remainder of the premises, including the land used for carts and lorries, cranes, weighing machines, offices, the building, and the tramway across the street, they should be assessed on the full annual value. He therefore dismissed the summons.

The question for the opinion of the Court (so far as material for the purposes of this report) was:—

Whether upon the facts stated the respondents were entitled to be rated, under the provisions of s. 36 of the Liverpool Corporation Act, 1893, upon one-fourth part of the net annual value of any part of the respondents' premises.

The Divisional Court (Day and Lawrance JJ.) gave judgment for the respondents. (1)

The appellant appealed.

Balfour Browne, *Q.C.*, and *E. Honoratus Lloyd* (with them *R. M. Montgomery*), for the appellant. The premises in question are not "land used as a railway made under the powers of an Act of Parliament for public conveyance." It has been held that a railway station does not come within an exemption like that contained in the Liverpool Corporation Act, 1893, except as regards platforms, sidings, and other matters essential to the railway as a mode of public conveyance: *South Wales Railway* v. *Swansea Local Board* (2); *London and North Western Railway* v. *Llandudno Improvement Commissioners*. (3) The ground of a partial exemption of this kind no doubt is that the mere railway as a road for public conveyance is not a property which derives so much benefit from carrying out the purposes of the Act as houses and shops and other business properties do; but this does not apply to offices, warehouses, and other buildings used by the company in their business as carriers. As compared with the case of a station, this is an a fortiori case: these premises are not like a station immediately connected with the railway. The lines by

(1) [1899] 2 Q. B. 197. (2) (1854) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) [1897] 1 Q. B. 287.

which these premises are connected with the railway are not railway lines over which there is a public right of conveyance: the dock lines and the tramway are used by the appellants merely by permission of the dock board and the respondents respectively, and permission may be withdrawn at any time. It is just as if the appellants had a receiving house or office at some distance from the railway for the reception of goods which they carried to or from the railway in carts. The lines and sidings within the premises cannot be said to be a railway for public conveyance; they are used for loading goods to be taken to the railway for public conveyance. The terms of the exemption shew that what it applies to is the "railway," meaning thereby the peculiar kind of highway established by the railway statutes, upon which there is a public right of conveyance on payment of the tolls. The ancillary buildings and structures which the railway company may provide for more conveniently and profitably carrying on their business, but which are not an essential portion of the railway regarded as a mode of public conveyance, are not within the exemption.

[They also cited *North Eastern Ry. Co.* v. *Scarborough Local Board* (1); *Newport Dock Co.* v. *Newport Local Board* (2); *Midland Ry. Co.* v. *Birmingham Borough Council* (3); *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority*. (4)]

C. A. Russell, Q.C., and *Page, Q.C.*, for the respondents. The question is whether the whole or any part of the respondents' premises is entitled to the partial exemption. It is true no doubt that the communication between these premises and the railway depends upon agreement with the respondents and the dock board, but, as matters stand, there is at present physically such communication, with the result that the lines, platforms, and other matters constituting these premises are worked as part of the appellants' system of railways for the purposes of public conveyance. Goods are both received and discharged at this station, and conveyance begins and ends

(1) (1869) 33 J. P. 244.
(2) (1862) 2 B. & S. 708; 31 L. J. (M.C.) 266.
(3) (1865) 13 L. T. 404.
(4) [1892] 1 Q. B. 357.

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there. The Act says nothing about the conveyance being for tolls; it is sufficient that it should be public. The station and lines were made under the statutory provisions of the London and North Western Railway Act, 1896, s. 20, and they thus come within the expression "land used as a railway made under the powers of an Act of Parliament for public conveyance."

[They cited *Stockport Union* v. *London and North Western Railway*. (1)]

R. M. Montgomery, in reply.

A. L. SMITH L.J. This is an appeal from a judgment of the Queen's Bench Division, and the point raised has been open to considerable argument; but when the matter is clearly understood, I think we can come to a pretty clear determination as to the rights of the parties.

The question arises under these circumstances. The railway company have a station which is called Wapping Station, with direct access to their line of railway. They were desirous to relieve the pressure at that station, and they found a piece of land which would suit them as a place for the overflow of goods from Wapping Station. They did not get parliamentary powers to join Wapping Station and this piece of land, but they approached the Mersey Docks and Harbour Board and obtained running powers over the dock tramway, and they also obtained a licence to connect the dock tramway by two lines of trams across the street which this vacant piece of land adjoined. This licence was determinable on one month's notice being given. In 1896 the company went to Parliament and obtained an Act conferring further powers on them under which they could acquire certain lands, and among them the piece of land in question, "for the purpose of extending the stations, sidings, warehouses, coal wharves, depots, and other accommodation of the company, for mineral goods and cattle traffic, and for other purposes connected with their undertaking." I should state that this piece of land which was subsequently bought under the powers of the Act was half a

(1) (1897) 66 L. J. (Q.B.) 781; (1898) 67 L. J. (Q.B.) 335.

mile away from the Wapping Station. They thus acquired the land and built on it a shed or a goods station, or a depot station, but whatever it is called it was a place used for the purpose of receiving and delivering goods. Inside this place there were eight lines of railway, each forty yards in length, with turntables to connect them with a set of rails at each end, which in their turn were in continuation of the two tram-lines which crossed the road.

Now, suppose these tramways across the road were not there —could any one call the lines inside the four walls a railway? Then these tram-lines outside are not a railway, for it has been held that a tramway is not a railway. The licence which may be terminated at a month's notice cannot make that a railway which would otherwise not be one, so that the blot on the case for the company is that they have not got any line of railway at this place, but only some rails inside the building.

I come now to the Act of Parliament. The provision in s. 36 (ii.) is taken from s. 211 of the Public Health Act, 1875, and that was taken out of the prior Public Health Act of 1848. The owner of land "used as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." When the Legislature deals with land "used as a railway," is it conceivable that it was intended to include a warehouse or shed not connected with a railway? Speaking for myself, I cannot put that construction on the Act. What was meant was a railway in the ordinary sense, that is, a line of rails, connecting one place with another, over which goods and passengers are carried, and not such rails as those within these four walls. I think, therefore, the exemption has no application to this case, and that the decision should be in favour of the corporation.

There is, however, another question that has been raised on which I have not so confident an opinion as on the point I have dealt with. It is said that even if these rails could be called a railway, they would not constitute a railway made

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under the powers of any Act of Parliament. It was pointed out that there are no words in s. 20 of the company's Act of 1896 which empowered them to make a station. The power is to buy land under compulsory powers, which they have done, intending no doubt to put up this building which they have erected as a receiving house for goods. It seems to me that it would be stretching the powers given to the company to treat that as an exercise of a power to make a railway for public conveyance. I prefer, however, to rest my judgment on the first point that I have dealt with.

The appeal should, in my opinion, be allowed.

COLLINS L.J. I am of the same opinion. The railway company have got to shew that what is called the Brunswick Docks Goods Station is used as a railway made under the powers of an Act of Parliament for public conveyance. Now, one element that might have been capable of introducing confusion into the case is that the station is physically connected by lines of iron rails giving a means of access to the company's railway. It is, however, admitted that nothing can be made of that fact, because those rails are not a railway within the meaning of the Acts of Parliament relating to railways. They are part of a tramway over which the company have a licence, and, therefore, the connection cannot be prayed in aid to assist in determining what this system of rails in the building is. The discussion, therefore, begins with the admission that it is necessary to argue that the system of rails within the area of the station itself constitutes a railway. An illustration was given by counsel for the company, who did not shrink from saying that, if the illustration were applicable to the facts of this case, the system of rails would still be a railway. It was said the case would be the same if access were had, not over the tramway, but by carting along the road, and the rails in the goods station were such that wheels without flanges would run upon them, so that all the trucks in the station could be taken by road to the company's railway at Wapping. I think it is impossible to support the contention that the arrangement of rails, each forty yards long, in an area which may be taken at

about forty yards square, can be described as a railway. Much less can it be described as a railway made under the powers of an Act of Parliament for public conveyance. The company took no power to charge for public conveyance over these rails, nor did they confer any rights on the public to insist upon conveyance within the ambit of this goods station. On looking at the Act, it is made clear how the Legislature deal with the making of a railway, and how they deal with the making of accessories to a railway. Powers were taken under this Act to make and maintain lines, which by s. 5 are when made to be part of the company's undertaking, for the use whereof and for the conveyance thereover of passengers, parcels, and merchandise the company may demand and take the rates and charges authorized by one of their previous Acts. The contrast between the powers so given and those under which this land was purchased is marked. It seems to me that in the latter case the powers given are simply to make the works accessory to an existing railway and not to make a railway; and, therefore, these works constructed under those ancillary powers do not constitute a railway constructed under the powers of an Act of Parliament for any public conveyance. There is no right of public conveyance over them, no right to impose tolls for transit over them, and they would not come within the jurisdiction of the Railway Commissioners in respect of those matters. It is a fallacy to say that because in the Regulation of Railways Act "railway" embraces "station," so that the Railway Commissioners have jurisdiction over a station, that, therefore, for all purposes a station is a railway. There might be jurisdiction in the case of undue preference or the like matter, but on the question whether a particular piece of rail is a railway open to public traffic the commissioners would have no jurisdiction unless it were a highway thrown open to the public on certain terms and conditions.

As a matter of common sense, looking to the ordinary meaning of "railway," I should say this arrangement of lines and sidings is not a railway, and, looking at it in point of law, I find nothing to shew that this is a railway made under the powers of an Act of Parliament for public conveyance.

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ROMER L.J. I have felt, and still feel, great doubt on this case; but, on the whole, I agree with the judgments which have been delivered.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for H. E. Clare, Liverpool.*

Solicitor for respondents: *C. H. Mason.*

A. M.

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[IN THE COURT OF APPEAL.]

MASON *v.* A. R. DEAN, LIMITED.

Employer and Workman—Compensation—Employment—Undertaker — Construction of Building—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Where a building over thirty feet high is being constructed by means of a scaffolding, and the work of construction is being carried out by several persons not acting jointly, but each of them contracting with the building owner for the construction of a separate substantial part of the building, each of them is an "undertaker" within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and is liable to compensate the workmen employed by him for personal injury sustained by them in the course of their employment. Every workman employed by the undertaker upon the building is within the Act, whatever may be the nature of his own particular work.

APPEAL from the decision of the judge of the Salford County Court upon questions of law arising under the Workmen's Compensation Act, 1897.

The appellant, who was the widow of a man named Mason, had claimed compensation under the Act from the respondents in respect of her husband's death from an accident while in their employment. The application was referred to an arbitrator, who made his award subject to a special case, which was in substance as follows:—

The accident by which the deceased lost his life happened on February 10, 1899, at the Lyceum Theatre, Eccles, an incomplete building then exceeding thirty feet in height and then being constructed by means of scaffolding. Messrs. Moore & Son, a firm of builders, had prior to the date of the accident

contracted with the building owner for the construction of the building and for the erection of the scaffolding. Under powers reserved in Messrs. Moore & Son's contract to the architect, the latter let to the respondents, a firm of furnishers and decorators at Birmingham, the decorative work, and the respondents entered into a contract for its execution. Under this contract the respondents were not only to do the decorative painting, but were to provide and fix a moulded circular ceiling of considerable weight, to provide and fix the proscenium, columns and caps for the private boxes, columns, caps and arches for the stalls, and other such matters. The scaffolding used by the respondents' workmen was erected by Moore & Son, and was used by the respondents' workmen free of charge. The deceased was on the day of the accident engaged in painting the ceiling of the theatre, which was a part of the work contracted for by the respondents. While walking on the scaffolding one of the planks gave way, and he fell to the floor of the theatre and was killed.

It was contended on behalf of the appellant that the respondents were undertakers within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and that they were engaged on work of construction in a building exceeding thirty feet in height and then being constructed by means of a scaffolding. The respondents contended the contrary. Upon the facts the arbitrator held, subject to the present case, that the respondents were undertakers within the meaning of s. 7, sub-s. 2, of the Act, and that they were engaged in the construction of a building exceeding thirty feet in height and in the course of construction by means of a scaffolding. He made an award of 300*l.* in favour of the appellant, but stated a case under Sched. II., clause 4, of the Act, which raised the following questions of law for the decision of the county court judge: (1.) whether the respondents were undertakers in the construction of a building within the meaning of the Act; and (2.) whether the employment in the course of which the personal injuries were caused to the deceased was an employment to which the Act applied. The county court judge answered—(1.) that the undertakers were engaged in construction as well as

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other things, and (2.) that painting the ceiling of the theatre had been held by the Court of Appeal to be employment not within the Act; he therefore set aside the award.

The applicant appealed.

R. W. Harper, for the appellant. The decision of the county court judge proceeded upon a misapprehension of the judgment of the Court of Appeal in *Wood* v. *Walsh* (1); the proper test to apply was not whether the deceased was painting at the time of the accident, but whether he was employed on a building exceeding thirty feet in height then being constructed by means of a scaffolding. The work contracted for by the respondents was clearly, as the county court judge found, work of construction, and it is impossible to contend successfully that they were not undertakers; the appellant is therefore entitled to compensation, and the award of the arbitrator should be restored.

[He was stopped by the Court.]

C. A. Russell, Q.C. (*T. F. Byrne* with him), for the respondents. The only question is whether the respondents were undertakers within the meaning of the Act. They were not undertakers, and employment by them is therefore not an employment to which the Act applies. It is not sufficient that they were engaged in part of the work of construction of a building; the undertakers must be the persons who are engaged in *the* construction of *the* building. That was what Moore & Son undertook to do, and they were the undertakers for the purposes of the Act; it is immaterial that under the reservation in their contract a portion of the work was let directly by the building owner to the respondents. There can only be one undertaker, who must be the person undertaking the construction of the whole, or substantially the whole, building. What the respondents undertook was only something subsidiary to Moore & Son's contract.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. The arbitrator before whom the application was

(1) [1899] 1 Q. B. 1009.

heard thought that the respondents were liable under the Act to pay compensation, but the learned county court judge, being of opinion that the case came within the decision of this Court in *Wood* v. *Walsh* (1), overruled his decision; in my judgment that case, when carefully considered, has no application to the present, and the decision of the arbitrator should be restored. The facts are simple. A firm of Moore & Sons had contracted to build a theatre; in the contract there was a provision that as regards part of the work the building owner might, if he pleased, take it out of their hands and give it to somebody else; this was done, and the work, which has been called decorative work, was put in the hands of the respondents, who contracted separately with the owner for it. While the respondents were carrying out this work, the appellant's husband, a workman in their employment, met with his death through an accident to the scaffold board on which he was standing. The question is whether the respondents are liable under the Act of 1897 to pay compensation to the appellant in respect of the fatal accident to her husband, for the Act only brings within its scope certain classes of workmen and certain classes of employers.

It is to be remarked that at the time of the accident the theatre was not a completed building—a fact which at once distinguishes the case from *Wood* v. *Walsh* (1); the work which the respondents contracted to do was work done to the building while in course of construction, and was necessary to make it a completed building as regards construction. If we look at the respondents' contract, it is clear that what they undertook was part of the work of construction of the building. They had to supply and fix a moulded ceiling of considerable weight; to provide, erect and fix the proscenium; to provide and fix columns and caps for the private boxes, columns, caps and arches for the stalls, and other suchlike matters. It is true that under the contract there was also decoration pure and simple which the respondents had to execute; but it is not necessary for us to say whether decoration comes within the meaning of construction, for there is ample evidence to shew

(1) [1899] 1 Q. B. 1009.

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that the respondents had to perform matters of construction under their contract.

The real question is whether the respondents were undertakers within the meaning of the Act. Sect. 7 says, "This Act shall apply only to employment by the undertakers as hereinafter defined," and I agree that it is necessary to make out that the respondents were such undertakers; then it goes on, "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding." Here we have a building of the requisite height which was being constructed by means of a scaffolding, and therefore, so far as the deceased was concerned, he was at the time of the accident being employed on a building over thirty feet high which was being constructed by a scaffolding. Was he being employed by the undertakers within the meaning of the Act? In s. 7, sub-s. 2, the word "undertakers" is defined as meaning, in the case of a building, "the persons undertaking the construction, repair, or demolition." Does that definition (I lay no stress on the use of the plural form) mean that the undertaker is the man who is undertaking the construction of the building as a whole, or does it mean that any man is an undertaker who undertakes a substantial part of the construction without which the building could not be completed? I think that the true meaning is that, if any person undertakes a material part of the construction of a building over thirty feet in height which is being constructed by means of scaffolding, he is an undertaker within the meaning of the Act, and is liable to pay compensation in respect of personal injuries to his workmen while engaged on the building. For these reasons I think that this appeal should be allowed.

COLLINS L.J. I am of the same opinion. The learned county court judge, when dealing with the second question put by the arbitrator, seems to have misapprehended the effect of the decision in *Wood* v. *Walsh*. (1) The arbitrator had found as a fact that the work upon which the deceased was engaged was work of construction as distinguished from decoration;

(1) [1899] 1 Q. B. 1009.

with that finding I entirely agree. Looking at the contract, it is clear that it embraces work which in any fair sense of the word is construction rather than decoration, for it was work which was necessary in order to make the theatre complete as a building. The conclusion, therefore, cannot be supported on the ground upon which the learned county court judge based it.

But then it is contended on behalf of the respondents that the judge was wrong in holding that they were undertakers, as they were only contractors for a part of the work which was necessary in order to complete the construction of the building. It is said that the scheme of the Workmen's Compensation Act only deals with certain classes of employment, and that it indicates that those classes deal with works of magnitude; and that, therefore, in sweeping buildings within its purview the Act affects only those persons who are undertaking *the* construction, that is, the construction of the whole building, as opposed to those who undertake the construction of certain parts only, and that to bring a builder within the Act he must be the contractor for the construction of the whole building, or at any rate of substantially the whole building, though part may be constructed by somebody else. We have often said in this Court that too much weight should not be placed upon the presumed intention of the Legislature, but that we must look at the grammatical construction of the language of the Act, even though that may at times involve consequences which were apparently not contemplated by the framers of the Act. Here the deceased man was employed in painting, and it was this fact which misled the county court judge; the particular work which the man is doing has nothing to do with the question of his employment by the undertakers within the meaning of the Act. He must be in the employment of the undertakers on, in or about a building over thirty feet high which is being constructed or repaired by means of a scaffolding or is being demolished; if that is the case, it does not matter in what particular department of the work the man is employed, for he is employed by the undertakers who themselves are within the definition in the Act. Therefore, in order to found the liability of the respondents, it must be shewn that

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they were the persons undertaking the construction, repair or demolition of the building. They certainly were persons who were undertaking the construction of part of the building, and as regards this definition it may be accidental, but it so happens that the Legislature has used the word "persons" in the plural, and in terms has said that the construction may be the result of the efforts of more than one person; and in a case where more than one person is bringing about the construction of a building it seems difficult to say that it does not fall within the definition. But I do not lay stress upon the presence of the plural form "persons"; I think that the definition is capable of embracing any person who is engaged on that which is really the construction of a building, inasmuch as the building itself cannot be finished until the construction of his part is completed. I think, therefore, that the respondents were engaged in the undertaking of constructing a building, and that the appellant is entitled to compensation on the ground that the respondents were undertakers within the meaning of the Act, and that the deceased met with the accident while in their employment.

ROMER L.J. I agree. If a building is being constructed by several undertakers, not acting jointly, but each undertaking the construction of a separate substantial part of the building, I think that each falls within the definition of "undertakers" in s. 7, sub-s. 2, of the Act. But under s. 7, sub-s. 1, only that undertaker is liable to pay compensation in whose employment the injured man was at the time of the accident. In my judgment the only difficulties in the way of this construction of the section are purely verbal; the construction we are putting on the section appears to me to be a sensible one and the true one, and the only one by which absurd results can be avoided.

Appeal allowed.

Solicitors for appellant: *Arkcoll, Cockell & Chadwick, for Alfred Bates, Morecambe.*

Solicitors for respondents: *Lawson, Coppock & Hart, Manchester, for Hargreave & Heaton, Birmingham.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1900
Feb. 24.

CASS *v.* BUTLER.

Employer and Workman—Compensation—Undertaker—Sub-contractor—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

A sub-contractor is not an undertaker within the meaning of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Leeds County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent was the widow of a painter who was killed while in the employment of the appellant. The facts were shortly as follows:—

An electrical station, which was over thirty feet in height, was being built for the Leeds Corporation by a builder named Gould, who had contracted for the erection of the whole building; the painting work had been sub-let by Gould to the appellant, a painter and decorator. While employed in painting the girders in the interior of the roof, using for that purpose the scaffolding erected by Gould, the deceased met with a fatal accident owing to the breaking of one of the planks of the scaffolding. The building was being painted for the first time. The learned county court judge held that the appellant was an undertaker within the meaning of the Workmen's Compensation Act, 1897, and that the painting of a new building was "construction" within the meaning of the Act. The employer appealed.

Ruegg, Q.C. (*Arthur Powell* with him), for the appellant. The appellant was merely a sub-contractor, and was therefore not an undertaker within the meaning of the Workmen's Compensation Act. The scheme of s. 4 is not that a sub-contractor is to be liable as an undertaker, but that the contractor is to be affected with the liability of an undertaker, with a right of

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indemnity over against the sub-contractor in certain cases. The proceedings should have been taken against Gould. The case of *Mason* v. *Dean* (1) is not in point; there there were two independent contractors who each contracted separately with the building owner to do a separate and substantial part of the work of construction, and each was held to be an undertaker within the meaning of the Act; a sub-contractor cannot be said to undertake the construction of a building, for he has no contractual relations with the building owner. Secondly, painting is not construction; the case is not differentiated from *Wood* v. *Walsh* (2) by reason of the building being a new one which had not been painted before.

Temple Franks, for the respondent. The county court judge has found on the facts that the appellant was an undertaker, and the finding is not subject to appeal. But, assuming that the question is not wholly one of fact, there is nothing in the Act to shew that a sub-contractor cannot be an "undertaker" within the meaning of the Act. The case of *Mason* v. *Dean* (1) shews that any person who undertakes a substantial part of the construction of a building is an undertaker, and a sub-contractor may be an undertaker within the principle of that decision. There is nothing in s. 4 (3) to prevent a sub-contractor from being an undertaker; the effect of that section is to give an additional remedy to the workman, and to enable him to make his application for compensation either against the original contractor or the sub-contractor at his pleasure.

(1) Ante, p. 770.

(2) [1899] 1 Q. B. 1009.

(3) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 4, "Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

"Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section."

A. L. SMITH L.J. I am of opinion that the learned county court judge was wrong. The note with which we have been supplied is a very bare one, but the facts are not disputed, and are shortly these. A builder, named Gould, contracted for the erection of a building, and employed the appellant, a painter and decorator, to do the painting work; the appellant employed, among others, the deceased to do the actual painting, and the deceased was painting part of the roof when the accident happened. Two points have been taken on behalf of the respondent, but it is unnecessary for us to determine whether painting a new house is construction within the meaning of this Act, for the other point is sufficient to dispose of the case: that point is that the appellant was not an undertaker at all, but that Gould was the undertaker, and that compensation can only be claimed from him and not from the appellant. In other words, the question is whether a sub-contractor for the painting work is an undertaker within the meaning of the Act, so that the injured workman has an option to sue either the sub-contractor or the original contractor, that is, the undertaker. It is contended that both the appellant and Gould were undertakers; but that is not the meaning of the Act at all. "Undertakers" are defined by s. 7, sub-s. 2, as being, in the case of a building, "the persons undertaking the construction, repair, or demolition." Who satisfies that definition in the present case? Clearly Gould, and Gould alone. The case of *Mason* v. *Dean* (1), upon which reliance has been placed, is altogether different: in that case there was a builder who contracted with the building owner to build a theatre, and who was of course an undertaker; but power was reserved to the building owner in the contract to take a portion of the work of construction out of the builder's hands and to let that portion directly to another person; that was done, and it was held that the person who took the latter contract, not being a sub-contractor, came within the Act, for he had contracted with the building owner for a part of the construction of the theatre, and was the undertaker for that part within the meaning of the Act. In my opinion the language of s. 4 of the Act, which

(1) Ante, p. 770.

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was relied upon by the respondent's counsel, so far from being an authority in his favour, fortifies the construction which we are placing on the word "undertaker." A sub-contractor with the undertaker is in my opinion not an undertaker within the meaning of the Act, and the appeal should therefore be allowed.

COLLINS L.J. I am of the same opinion upon the same grounds.

ROMER L.J. I agree.

Appeal allowed.

Solicitors for appellant: *William Hurd & Son, for H. A. Child, Leeds.*

Solicitors for respondent: *Hamlin, Grammer & Hamlin, for C. Dunn, Leeds.*

W. J. B.

C. A. 1900 *March* 3, 5.

[IN THE COURT OF APPEAL.]

LYSONS *v.* ANDREW KNOWLES & SONS, LIMITED.

Employer and Workman—Compensation—Employment to which Act applies—Employment for less than Two Weeks—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), s. 1, *sub-s.* 1; *Sched I., cl.* 1 (*b*).

In order to obtain the benefit of the Workmen's Compensation Act, 1897, a workman must have been for at least two weeks in the employment of the employer in whose service he has sustained the injury for which he seeks compensation.

APPEAL from a decision of the judge of the Salford County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a miner, was employed by the appellants, a colliery company, by the day, at the daily wage of 6*s*. He commenced to work for the appellants on Tuesday, July 18, 1899, when he went down into the pit and did a day's work; the Wednesday being a holiday, the mine was closed, but the respondent went down the mine on Thursday, July 20, to do a day's work, and was injured while in the mine by the fall of a

piece of coal; the 6*s.* for his first day's work were paid on Friday, July 21, and 6*s.* for his second day's work on Friday, July 28, the colliery week ending on Tuesday evening, and Friday being the weekly pay-day. The learned county court judge held that, as the respondent had in fact earned 12*s.* in one week or period of seven days, that sum must be taken to be his "average weekly earnings" for the purpose of assessing compensation under clause 1 (*b*) of Sched. I. of the Act; he therefore awarded him 6*s.* a week as compensation. (1) The employers appealed.

F. H. Mellor, for the appellants. The respondent is not entitled to compensation under the Act. In order to entitle him to compensation, it is not sufficient that he has worked for two days in one period of seven consecutive days. Throughout the schedule the week is taken as the unit for the assessment of compensation. The use of the word "average" in the phrase "average weekly earnings" implies the idea of plurality, and shews that the Act contemplates the existence of the relation of master and servant for a period of at least two weeks; otherwise it would be impossible to arrive at the average weekly earnings which are the basis of the compensation to be awarded. The Act seems to exclude mere casual employment from its operation.

Joseph Walton, Q.C., and *W. T. Postlethwaite*, for the respondent. There is nothing in the Act or the first schedule to confine the operation of the Act to men employed by the week and to exclude the day labourer. In clause 1 (*a*) of the schedule, which deals with fatal accidents, the compensation is based upon the amount actually earned during the time that the workman has been in the employment of the same employer,

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), Sched. I., cl. 1, "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

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and there is nothing in the language used to exclude the day labourer or casual labourer. Similarly, in clause 1 (*b*), which provides for cases of total or partial incapacity, the average weekly earnings are to be arrived at by taking the whole of the workman's earnings from the same employer and dividing them by the number of weeks that he has been employed; if he has only been employed one week, then 1 would of course be the divisor. It is not money earned at a particular rate per week with which the schedule deals, but the money actually earned, and the total money in fact earned is to be reduced to the terms of a weekly payment. The expression "weekly earnings" does not import an agreement to pay wages weekly. Secondly, the benefits of the Act are not confined to men who have been employed by the same employer for at least two weeks. The amount of compensation depends no doubt on the rate of the wages earned, but it is not affected by the length of time during which the employment has lasted; a man who has been employed nine months is only entitled to the same compensation as one who has been employed for nine weeks, if their wages have been the same; the only limit that can be suggested arises from the use of the word "average." But the necessity to average the payments only arises where there is more than one weekly payment to average; where there is not, the weekly payment is already arrived at. Under the Act the respondent is absolutely entitled to compensation, and the difficulty of determining the amount under the schedule does not deprive him of the benefit conferred by statute.

F. H. Mellor, in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. The question, which is one of prime importance, is really whether a workman, who enters on a particular day upon a daily employment and is injured on that day, is within the purview of the Act, and whether his employment is within its purview. The facts of the case raise this question, although as a matter of fact the respondent had worked two days. He entered the employment of the appellants on Tuesday, July 18, and did a day's work for them as a day

labourer; at the end of the day he was entitled to go away and not come back to work; there was apparently no contract as to the amount of his wages, but he subsequently received 6*s.* for his day's work. On the Wednesday the pit was not working, and he did not go to work; but on Thursday, the 20th, he went down the pit to do a day's work, and was injured. We may confine the point for our decision to the single question whether a man who works for his employer on one day only, and is injured while working, is within the Act. A very able argument has been addressed to us, and we have been pressed with the difficulty why such a man should not be within the Act; but, as I have said before, it is impossible to give a satisfactory answer to that question, and we can only say whether on the true construction of the language of the Act the respondent comes within it. Construing the Act as we think it should be construed, we have in one case been compelled to hold that a painter painting a house by means of a ladder was not within the Act, whereas a workman employed by a builder on a house over thirty feet high which is being constructed by means of a scaffolding is clearly within it. But why the one man should be included in the Act, and the other should be outside it, it is impossible to say.

The first schedule, which regulates the scale and conditions of compensation, is one of the most important parts of the statute. To get at the class of workmen to whom the Act applies we must turn to s. 1, sub-s. 1, of the Act itself, which provides that "if in any employment to which this Act applies" —and by s. 7 it applies to employment in a mine—"personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Compensation is, therefore, if the workman comes within the purview of the Act, to be assessed in accordance with the provisions of the first schedule. Passing on to that schedule, we find that clause 1 (*a*) deals with the amount of compensation payable in cases where death results: that does not apply to the facts of the present case, but the provisions cannot be passed over.

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A. L. Smith L.J.

That clause enacts at starting that, where the workman leaves any dependants wholly dependent on his earnings, the compensation is to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury"—it contemplates, therefore, a three years' employment as the basis for making the calculation—"or the sum of 150*l.*, whichever of those sums is the larger, but not exceeding in any case 300*l.*, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer"; the words "average weekly earnings" there come in for the first time. Let us take the case of a man who is killed before he has been three years in his place, say upon the first day of his service: how is the tribunal to calculate 156 times his average weekly earnings? There are no weekly earnings to average. It has been contended that the word "average" is not a material word, but this view is not supported by a further examination of the language of the schedule. Clause 1 (*b*), which deals with total or partial incapacity for work resulting from the injury, makes the amount of compensation "a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings," &c., while clause 2 provides that, in fixing the amount of the compensation, regard is to be had to the difference between the amount of the "average weekly earnings" of the workman before the accident and the average amount which he is able to earn after it. To what conclusion ought this language to lead us? To the conclusion that the Act embraces men who undertake work within the purview of the Act and who work for a day only, or to the conclusion that it is confined to men who work for such a time that their weekly earnings can be averaged? The former conclusion, which is contended for by the respondent, would cut the word "average" altogether out of the schedule; but this cannot be done, for the word is un-

ambiguous, and was undoubtedly put into the schedule by the Legislature for some reason. Is not this Court then necessarily driven to say that, in order to come within the Act, a man must have been in his employment for at least two weeks at the date of the accident? Unless we say that, I cannot see how an average of the weekly earnings can be taken. If a man has worked for two weeks, the question as to the amount of compensation is quite clear, for the earnings of those two weeks can be averaged; if he has not worked so long, then to hold that he was within the Act would give no signification to the expression "average weekly earnings." If a man receives 6*s*. for one day's work, there is nothing with which the money earned on that day can be averaged. In my opinion, a workman does not come within the Act unless he has been for two weeks in the employment of the employer in whose service he was injured; if he has been that time, the schedule can be applied and the compensation to which he is entitled becomes capable of being calculated.

COLLINS L.J. I am of the same opinion. It has often been said in this Court that it is impossible to give a decision upon this Act which shall be logical and free from anomalies. The Legislature has not chosen to bring every workman within the purview of the Act, but has limited its operation to certain employments; it is not our province to extend its operation. We have, however, some indication given by the Legislature to guide us in considering the present question. The Legislature has said that the workman's right to compensation is to be ascertained in accordance with the first schedule, and has made the employer liable in accordance with that schedule. Looking at the schedule, it seems that what it is primâ facie dealing with is a workman who has been for some time in the relation of servant to the master who has to pay the compensation. It is obvious that the injury may be the same, and the loss sustained through the inability to earn wages may be the same, whether the man has been in his employment for a year, or for a month, or only for a single day; the duration of the employment cannot affect the severity of, or the loss caused by,

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the injury. The Act clearly excludes from the assessment of compensation the time which the applicant has spent in an employment other than that of the master in whose service he has been injured, and this fact affords us some indication as to how we should construe the language of the schedule. If the Act meant to include a man in the position of the respondent, why should the standard of compensation be limited to one day's work? And yet that would be the necessary result of the provision that the employer is liable only on the basis of wages earned in his own employ. Take the case of a workman who is in six different employments, each for one day in the week, and suppose that those employments continue for, say, a month; assuming that he is within the purview of the Act, he cannot earn from any one of his employers more than one day's wages in the week, and the compensation to which he would be entitled would work out at 50 per cent. of one-sixth of his total average weekly earnings, which would be 50 per cent. of his average weekly earnings from the master in whose employment he was injured. This is an anomalous result, but it must have been intended by the Legislature if such workmen are within the Act at all. The inference is, therefore, that they were not intended to be included. It seems to me that, when it was dealing with the assessment of the amount of compensation, the Legislature in taking in the case of death a maximum of three years' earnings as the basis of the assessment was evidently contemplating the existence for a considerable time of the relation of master and servant; then it went on to deal with the assessment in cases where that relationship has lasted for less than three years, but provided that compensation was to be assessed on the basis of 156 times the average weekly earnings during the period of actual employment; this again contemplates a period of some duration, which cannot, I think, be less than two weeks. Then again, when dealing with total or partial incapacity, the standard adopted is the average weekly earnings. It seems to me, therefore, that the schedule contemplates the existence of the relation of master and servant for not less than two weeks between the injured man and his employer. In the particular

case, the respondent had at the very highest only been two days at work, and it would be straining the language of the statute and the intention (so far as I can gather it) of the Legislature were we by our decision to-day to introduce such a person within the ambit of the Act. An arbitrary line has, no doubt, to be drawn, and a person who is just on one side of it may reasonably think that he ought to be on the other; but such considerations cannot affect the interpretation of this schedule.

ROMER L.J. I feel very great doubt upon this point, but I am not prepared to differ from the judgment of the rest of the Court.

Appeal allowed.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Fullagar & Hulton, Bolton.*

Solicitors for respondent: *Radford & Frankland, for Bowden & Widdowson, Manchester.*

W. J. B.

C. A.
1900
March 10.

[IN THE COURT OF APPEAL.]

FENN *v.* MILLER.

Employer and Workman — Compensation — Personal Injury by Accident — Employment "about" a Factory — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

Employment "about" a factory means employment about the locality of the factory, and does not include employment about the business of the factory at a distance from the factory itself.

A builder was erecting houses on a building estate which was in course of development; on the estate was a barn containing a steam-engine and mortar-mill, which were used for the purposes of the building operations, and which constituted a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. The respondent, a labourer in the builder's employment, whose duty it was to fetch water in a cart from a brook at some distance along the main road for the mortar-mill and buildings, was injured while returning with the cart at a spot about 110 to 160 yards distant from the engine and mortar-mill owing to the horse running away:—

Held, that there was no evidence upon which a county court judge could properly find that the employment of the respondent was employment "about" a factory within the meaning of the Act.

Appeal from a decision of the judge of the Bow County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent was a builder's labourer in the employment of the appellant, a builder, who was erecting houses upon a building estate then in course of development; the houses were only five or six feet high at the time of the accident. Upon the building estate at some little distance from the houses that were being erected was a barn, in which there was a steam-engine that worked a mortar-mill for the purpose of the building operations. The duty of the respondent was to take a water-cart to a brook at some little distance along a main road, which ran by the side of the building estate, and which was a public highway, fill the cart with water, and bring it back to the buildings or the barn. The respondent, having filled the water-cart from the brook, was returning along the main road, when the horse ran away, and he was knocked down and run

over; the accident happened at a spot variously estimated at 110 and 160 yards from the barn. The county court judge held that the respondent was entitled to compensation under the Act, and made an award in his favour.

The employer appealed.

Rawlinson, Q.C. (*P. Rose-Innes* with him), for the appellant. The employment of the respondent at the time of the accident was not employment "about" a factory within the meaning of s. 7, sub-s. 1, of the Act, and there was no evidence upon which the learned county court judge could properly so find. Employment about the buildings is insufficient to bring the respondent within the Act, and he can only rely on employment "about" the engine and mortar-mill, which were a factory under the decision in *McNicholas* v. *Dawson*. (1) It cannot be successfully contended that the facts shewed that the respondent was employed "about" the engine and mortar-mill when he was injured, the word "about" involving the idea of physical propinquity: *Powell* v. *Brown* (2); *Lowth* v. *Ibbotson*. (3)

Ruegg, Q.C., and *W. M. Thompson*, for the respondent. The county court judge was right. The whole of the building estate was under the appellant's control, and he was using it for the building operations. The engine and mortar-mill constituted a factory, and a factory in the middle of a building estate on which building operations are being conducted is in the same position as a factory in the middle of a factory yard.

[ROMER L.J. Do you contend that the presence of a steam-engine in the middle of a gentleman's estate or a farm would turn the whole estate or farm into a factory?]

No; the ground must have some relation to the factory; it must be used for the purposes of, or in connection with, the factory. Here the accident happened in close proximity to the building estate, and therefore the county court judge had a right to find as a fact that the respondent was employed "about" the factory. The question of close proximity is one

(1) [1899] 1 Q. B. 773. (2) [1899] 1 Q. B. 157.
(3) [1899] 1 Q. B. 1003.

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of fact for the tribunal which tries the case, and there was evidence to support the county court judge's finding.

A. L. SMITH L.J. I think that the facts as they have been stated to us shew that the finding of the learned county court judge was wrong; but I have a difficulty in saying that the appeal should be allowed, with which I will deal in a moment. The facts are these. There was a mortar-mill in a barn, and there was a water-cart which the respondent had to take to the Ching brook, where he filled it, and back again for the purpose of feeding the engine that worked the mortar-mill and thereby making mortar for use in buildings in the course of erection. On his way back from the brook the horse ran away, and the respondent was knocked down and run over at a spot which is described as being from 110 to 160 yards (and it may be more) from the mortar-mill and engine. It is quite clear from *McNicholas* v. *Dawson* (1) that the engine is made a factory by the operation of s. 23 of the Factory and Workshop Act, 1895, and s. 7 of the Workmen's Compensation Act, 1897; therefore the question in this case is whether the respondent comes within the latter Act; in other words, whether he was at the time of the accident employed on, in or about this engine and mortar-mill. He was getting water for it, no doubt, but at a distance of 110 to 160 yards, when he was knocked down; the accident clearly had nothing to do with the engine. Had I been dealing with the case in the first instance, I should certainly not have held that the respondent came within the statute; the learned county court judge, however, seems to have held that, as the section applied to employment "about" a factory, he was entitled, if he liked, to find that a spot 110 yards distant was in close propinquity or contiguity to the engine. I certainly could not so find myself, but I feel a difficulty in saying that there was no possible evidence upon which the judge could so hold.

We have had several cases in which this question has arisen. In *Powell* v. *Brown* (2) a man in the employment of the owner of a factory was working upon a cart belonging to his master;

(1) [1899] 1 Q. B. 773. (2) [1899] 1 Q. B. 157.

the cart was close up against the factory, but just outside it, at a spot where the workmen employed at the factory were accustomed to take timber out of the factory and place it upon carts for it to be taken away. We there went into the question whether the employment of the workman was employment on, in or about a factory, and we held that "about" was an enlarging word in the sense that the locality of the employment was not limited to employment "on" or "in" a factory. I used the expression "in close propinquity to," and my brother Collins used the expressions "physically contiguous" and "physical proximity," and we all held that the county court judge was right in holding that the employment was "about" a factory within the meaning of the Act. In *Chambers* v. *Whitehaven Harbour Commissioners* (1), also, we held that the Act made it necessary that the injury should happen in or about a locality which was within the purview of the Act, and in my judgment, after citing the early part of s. 7, sub-s. 1, I said: "Stopping there, the meaning is that at the time of the accident the workman must be employed about one of those specified localities; the locality of the accident must be within the purview of the section." I agree with what I there said. Then, in *Lowth* v. *Ibbotson* (2), a man was in his master's cart delivering bread at a distance of a mile and a half from his master's mill, which was a factory within the meaning of the Act; and the question was whether employment at a spot a mile and a half away was employment on, in or about a factory. The county court judge held it was not, and we held that he was right in what he held as a fact; and I held that the meaning of "about" was a question for the county court judge; I see no reason to differ from what I there said. In the present case the man was coming along a highway when his horse ran away and he was injured, and the question is whether he was in, on or about the engine and mortar-mill at the time. As a matter of fact I say that he was not; but we have nothing to do with questions of fact in this Court, and I have a difficulty in holding that no county court judge is entitled to say that a distance of 110 yards from a factory is

(1) [1899] 2 Q. B. 132. (2) [1899] 1 Q. B. 1003.

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"about" that factory. But my brethren think that there was no evidence on which the county court judge could find as he did, and I am not prepared to differ from the conclusion that they arrived at as to the result of this appeal; I therefore agree with them that the appeal should be allowed.

COLLINS L.J. I am of the same opinion. In these cases there must always be a question of fact for the county court judge, and, so far as a case before us depends upon a question of fact, we are of course bound by his findings. But it is not left at large under this Act, any more than under any other statute, to the county court judge to find a question of fact without guiding the exercise of his own discretion by a proper direction in law. If he could try such a case with a jury, he would be bound to give them the best direction he could as to the class of cases that would or would not come within the meaning of the word "about," and the jury, having the benefit of his direction, would then find as a fact whether in the particular case the employment was "about" the factory or other locality; but he could not leave the whole matter at large to the jury with a mere general statement that the Act of Parliament used the word "about," and give them no direction as to what the word means; to do that would be to substitute the jury for himself and to abrogate a portion of his own functions. No doubt it is not possible to define exactly the meaning of such a word as "about"; but the judge could assist the jury by illustrations of its meaning or by taking extreme cases which obviously fall on one side or the other of the line that is to be drawn by the jury, guided, as they should be, by his illustrations. In the present case it is possible to point out the limits that are to be avoided or observed—to point out that the word "about" is a geographical expression involving the idea of a certain physical contiguity. One thing the word clearly does not embrace, it is not sufficient that the workman should be about the business of his master, and it is possible that a jury might be helped if such considerations as I have suggested were put before them by the judge.

A factory necessarily involves the carrying on of business in

the factory, and the question which must arise in these cases is whether a workman has suffered personal injury by an accident arising out of and in the course of his employment about a factory in which his employer's business is carried on. Let us take the case of a factory where articles of commerce are produced; they are manufactured in the factory and then distributed over the country; it may be necessary for the purpose of the business to get coals to the factory, and for that purpose to send a cart to the railway station to fetch them; in such a case I should say that the carter was clearly employed about the business of the factory, but he would not be in physical contiguity to the factory; a jury would therefore have to disabuse their minds of the idea that employment about the master's business was the same thing as employment about the master's factory.

What sort of case is it that is covered by the word "about"? One case that would obviously fall within the meaning of the word is where the business of a factory involves the use of some land beyond the actual physical limits of the buildings; employment on that land, which may be regarded as a quasi-curtilage of the factory, would be employment "about" the factory. That is, indeed, a very similar case to *Powell* v. *Brown* (1), where the injured man was in the public street just outside the physical limits of the factory at the time of the accident, but was assisting in the performance of the main business of the factory—the receiving of timber. I think, then, that a case might well be put by the judge which comes within, and another which falls without, the line; when he has done that it would be for the jury to say whether in the particular instance the case fell on the one side of the line or on the other: he cannot do more. I draw a distinction between being engaged in a business which does not involve the necessity of physical contiguity to the factory, and the being actually in physical contiguity to the factory, by which I mean being within such area as a jury might say was reasonably necessary for the purposes of the business carried on in the factory: in the one case the jury would be entitled to say that the employment

(1) [1899] 1 Q. B. 157.

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Collins L.J.

was about the factory; in the other they would not be so entitled. Applying the principle which I have endeavoured to lay down, the facts of this case cannot bring it within the idea of physical contiguity; applying that standard, there is no evidence on which any jury could reasonably hold that there was such physical contiguity as to come within the meaning of the word "about" as used in the Act. The case seems to me far outside any line that can properly be drawn, though the question on which side of the line each case falls would be for the jury after direction from the judge, and when, as here, there is no jury, the judge is equally bound to direct himself.

ROMER L.J. I agree. It is clear that when the Act says "on, in or about" a factory, &c., it is speaking of a place, and it is quite possible that an accident might happen to a man while employed on his master's business which would not be within the Act. It is not necessary or advisable to try to lay down general rules or propositions as to when the employment can or cannot properly be said to be on, in or about a factory or buildings, and I make no attempt to do so now. But I may go so far as to say this. If at the time of the accident the workman is only employed in driving or leading a cart carrying materials necessary for the business carried on at the factory to or from the building, and is not himself in close proximity to the factory or building, he is not within the purview of the Act. On the facts of this case it is clear that at the time of the accident the respondent was in no true sense employed on, in or about the mortar-mill. I agree with Collins L.J. that there is no evidence on which the county court judge could properly find that he was so employed. If there could have been a jury, whose duty it would have been to determine the question, the judge should have held that there was no evidence for them.

Appeal allowed.

Solicitors for appellants: *Ponsford & Devenish.*
Solicitors for respondent: *Buchanan & Hurd.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1900
March 3.

MILNER *v.* GREAT NORTHERN RAILWAY COMPANY.

Employer and Workman—Compensation—Employment to which Act applies—Railway Refreshment Room—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.

Employment by a railway company in a railway refreshment room, to which the only entrance for the public is from the station platform, is not employment on or in or about a railway within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Peterborough County Court in an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a barmaid employed by the Great Northern Railway Company in their refreshment room at Peterborough Station, was injured while at her work by reason of a framed advertisement falling upon her from off the wall of the room. The refreshment room was directly managed by the railway company, and the only entrance to it for the public was from the station platform. The learned county court judge was of opinion that the respondent was at the time of the accident employed on or in or about a railway within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897 (1), and made an award of compensation in her favour. The railway company appealed.

(1) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7, sub-s. 1, the Act is to apply only to employment by the undertakers as thereinafter defined on or in or about (inter alia) a railway.

By s. 7, sub-s. 2, "undertakers" in the case of a railway means the railway company, and "railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and has the same meaning as in the said Act.

By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 3, "'railway' includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic."

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Montague Lush (*Clutton Brock* with him), for the appellants. The employment of the respondent was not employment on, in or about a railway within the meaning of the Act. It is true that by reason of the definition in s. 3 of the Regulation of Railways Act, 1873, the word "railway," as used in the Workmen's Compensation Act, 1897, includes a station used for purposes of public traffic; but it is not a correct inference that, as soon as it is once ascertained that a refreshment room is part of a station, a person employed in the refreshment room is employed on the railway. A refreshment room is not used for purposes of public traffic, and is not necessary for conducting the traffic. A railway company which keeps its own refreshment rooms in reality conducts two businesses, and the keeping of a refreshment room is not part of its business quâ railway company. A refreshment room is, like the solicitor's office in some railway stations, merely used for purposes ancillary to the conducting of public traffic. The Act applies only to those servants of a railway company engaged in what may strictly be called the railway business; if they are not so engaged, they are not entitled to compensation under the Act, and they cannot acquire a right to compensation from the mere fact of their employment being in local proximity to the railway properly so called.

T. Hollis Walker, for the respondent. The refreshment room was part of a station used for purposes of public traffic, and the employment was employment on, in or about a railway. Sect. 3 of the Regulation of Railways Act, 1873, does not mean that every part of a station must be used for purposes of public traffic, but that the station as a whole must be so used. The appellants do not carry on two separate businesses; they carry on the business of a railway company, and they only sell refreshments so far as doing so is incidental to that business; if they carried on separate businesses the business of refreshment-room keepers would be ultra vires.

[COLLINS L.J. In *South Eastern Ry. Co.* v. *Railway Commissioners* (1) the Court of Appeal said that the providing

(1) (1881) 6 Q. B. D. 586.

a refreshment room was not included in the provision of reasonable facilities for the receiving and forwarding of traffic.]

That case is not in point; necessity is not the test here, nor is the receiving and forwarding, nor what it is reasonable for the appellants to provide; the test is what they do in fact provide. The county court judge has found as a fact that the room was part of the station, and that is all that is necessary.

[A. L. SMITH L.J. Would employment in a hotel at a railway station be within the Act?]

Probably not; such a hotel would have entrances from the public street, and would not be restricted to the use of passengers.

A. L. SMITH L.J. I have come to the conclusion that this appeal should be allowed. In my opinion this railway refreshment room, where the respondent was injured by the falling upon her of a framed advertisement while at her work, was not a railway within the meaning of the Workmen's Compensation Act, 1897, as extended by the Regulation of Railways Act, 1873. By s. 7, sub-s. 1, of the Workmen's Compensation Act that Act is to apply to employment by the undertakers on or in or about a railway, and, stopping there, the question would arise whether a refreshment room in a station was on or in or about a railway. But the Act carries the matter a step further, and by s. 7, sub-s. 2, a railway is defined as meaning (inter alia) the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and the word is to have the same meaning as in the last-named Act. That brings us to the Act of 1873, s. 3 of which enacts that the term "railway" is to include every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic. The real question for us is narrowed down to whether a railway refreshment room can be said to be used for purposes of public traffic; I do not think that it can. In my judgment the section does not mean that every part of a station is to be included in the term "railway"; it is intended

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to include that part of a station which is used for purposes of public traffic. The learned county court judge in his elaborate judgment considered various parts or adjuncts of a railway station for the purpose of interpreting this section, such as a book-stall on the platform, and a hotel at the station for the accommodation of the public, and as regards the latter he thought that a hotel was used by travellers either before their journey was commenced or after it was ended, and that it was therefore not used for purposes of public traffic; he held, however, that this refreshment room was so used. During the argument my brother Collins referred to the case of *South Eastern Ry. Co.* v. *Railway Commissioners* (1), and the judgments of Lord Selborne and Brett L.J. in that case afford us considerable assistance in construing this section. One of the questions there raised was whether the Railway Commissioners had jurisdiction to order a railway company to provide refreshment accommodation at one of their stations, and the commissioners held that they had; the Court of Appeal, however, held that their jurisdiction only extended to ordering the provision of reasonable facilities for the receiving and forwarding of traffic, and that a refreshment room was not such a facility, for it was not a convenience for the purposes of traffic or of receiving or forwarding passengers, but was in the nature of a luxury. Applying that case to the present, it seems to shew that the refreshment room in the present case was not used for purposes of public traffic, which it must necessarily be in order to come within s. 3 of the Regulation of Railways Act, 1873. The case is therefore not destitute of authority; but the decision to which I have referred was not before the county court judge, who evidently entertained considerable doubt upon the matter and gave leave to appeal. Applying the case of *South Eastern Ry. Co.* v. *Railway Commissioners* (1) to the present case, I am compelled to hold that a refreshment room is not a facility for the purposes of public traffic, and that it is not used for purposes of public traffic within the meaning of s. 3 of the Regulation of Railways Act, 1873; this appeal must therefore be allowed.

(1) 6 Q. B. D. 586.

COLLINS L.J. I am of the same opinion. Primâ facie no one would suppose that a barmaid in a refreshment room at a railway station was within the purview of legislation affecting the employees of a railway company; but by refining away the language used in the statute a plausible argument has been addressed to us with the object of sweeping into the Act all those whose employment is within the ambit of the railway company's premises. Looking at the question critically, as we are entitled to do, I do not think that, where the whole or part of a building is used as a station, the part which is not used for purposes of public traffic is within the definition of "railway" in s. 3 of the Regulation of Railways Act, 1873. By that section "railway" includes every station belonging to the railway and used for the purposes of public traffic, and that definition lets in the precise standard which was applied by Lord Selborne and Brett L.J. in *South Eastern Ry. Co.* v. *Railway Commissioners*. (1) The precise point in that case was whether refreshment accommodation was a reasonable facility for the receiving, forwarding or delivering of traffic; if it was, the Railway Commissioners had jurisdiction. They assumed jurisdiction, but the Court of Appeal said that refreshment accommodation, although it ministered to the comfort or luxury of passengers, had nothing to do with the forwarding of traffic. In the present case the building as a whole, that is, the station, was no doubt used for the purposes of public traffic; the question is whether this particular part, the refreshment room, was so used, and I think that it was not.

ROMER L.J. I agree. I do not follow the contention that, because a building (broadly speaking) may be called part of a station, and the station is used for purposes of public traffic, therefore every part of, or room in, the station is necessarily used for purposes of public traffic within the meaning of s. 3 of the Regulation of Railways Act, 1873. In my opinion, a room in such a building may be, and often is, considered and treated as a part in itself, and not as being included in a station used for purposes of public traffic. In the present case

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I think that the refreshment room ought to be considered in itself as being something apart from the station, in the sense that it is not a station, or a part of a station, and used for purposes of public traffic. It can be, and ought to be, considered apart from the station as a whole.

Appeal allowed.

Solicitor for appellants: *R. Hill Dawe.*
Solicitors for respondent: *Bescoby & Williamson, Retford.*

W. J. B.

C. A. 1900 *March* 3.

[IN THE COURT OF APPEAL.]

RIXSOM *v.* PRITCHARD & RENWICK.

Employer and Workman—Compensation—Employment—Building exceeding Thirty Feet in Height—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *s.* 7, *sub-s.* 1.

Internal communication between a building over thirty feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher and that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding thirty feet in height within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

APPEAL from the decision of the judge of the Dartford County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a builder's labourer, had received personal injury while employed by the appellants, a firm of builders, upon the demolition of a building in High Street, Dartford. It appeared that in that street was a public-house, called the Bull Inn, which was a building more than thirty feet high; next door to the Bull, and on the same side of it, were two low buildings, both of which were less than thirty feet high and were originally used as shops. Some years before the accident the landlord of the Bull had acquired an interest in the shop immediately adjoining, and had made a communication between the two, the shop being used as an extra bar or beerhouse; the wall between the two was stated in the evidence to be "a wall

to both houses." Shortly before the accident the second of the two low buildings, a baker's shop, was also acquired by the landlord of the Bull, who decided to pull down the beerhouse and the baker's shop and rebuild them to the height of the Bull. The appellants were the contractors for this work, and were engaged in the demolition of the two low buildings, which had been demolished to within five or ten feet of the ground; while the respondent was employed on the demolition of the beerhouse and was wheeling a barrow-load of rubbish along a board, the board slipped and he was seriously injured. The actual building of the Bull had not been touched at the time of the accident. The county court judge was of opinion that, because there was a communication between the beerhouse and the Bull, and the two buildings were used for the common purpose of the business of the public-house, the respondent was engaged in the demolition of a building exceeding thirty feet in height; he found as facts (1.) that the applicant was engaged in the demolition of the beerhouse, and (2.) that the beerhouse was part of the Bull building, and he made an award in his favour. The employers appealed.

F. Low, for the appellants. No work was being done on a building exceeding thirty feet in height at the time of the accident; the fact that there was an internal communication did not make the beerhouse part of a building exceeding that height.

[He was stopped by the Court.]

Cyril Dodd, Q.C., and *Bassett Hopkins*, for the respondent. There was evidence upon which the county court judge could properly find as a fact that the beerhouse was a part of the Bull; both buildings were used for the same business, and the wall which served as a party-wall to the two was over thirty feet high. The demolition of a building less than thirty feet high, which is part of a building exceeding that height, is within the Act.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. The question for us is whether or not there is

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any evidence on which it can be held that at the time of the accident a building more than thirty feet in height was being demolished. The answer to it seems perfectly clear from the notes of the county court judge. There was a public-house called the Bull; originally there were two low buildings or shops on one side of it; the public-house was more than thirty feet high, the shops were not nearly so high. At the time of the accident the two shops, one of which had been turned into a beerhouse, were being pulled down and demolished, and the respondent was at work engaged in the demolition of the shops. He subsequently took these proceedings against his employers for compensation under the Workmen's Compensation Act upon the ground that at the time of the accident he was employed upon a building more than thirty feet high which was being demolished. I am clearly of opinion, upon the facts contained in the note, that this contention was wrong. The respondent said that he was engaged in pulling down the beer-house at the time of the accident; that is, not the Bull Inn, but the shop next door; then he says in cross-examination that "the building" had been demolished to five or ten feet from the ground, by which he obviously means the beerhouse, and not the Bull. Then comes the evidence of a fellow-workman, who was at work with the respondent at the time, who says that the building being pulled down was a beerhouse, and that it communicated with the Bull, there being an entrance through the Bull. Neither in that evidence nor in his cross-examination is there any evidence that any part of the Bull was being pulled down. Then there was the evidence of the appellant Renwick, who said that the old Bull was not touched to any extent, that there was a beerhouse adjoining with a doorway between it and the Bull; that both were used in the business of the Bull, and that no part of the buildings which had to be demolished was thirty feet high. I cannot see how upon this evidence it is possible to hold that there was demolition of a building more than thirty feet high. All that had happened was that a connection had been made internally between the two buildings, but this does not make the lesser a part of the greater. The mere fact that the public-house

business was carried on in both buildings does not make them both thirty feet high.

COLLINS L.J. and ROMER L.J. concurred.

Appeal allowed.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondent: *Noon & Clarke.*

W. J. B.

OVER *v.* HARWOOD.

1900
Jan. 26.

Vaccination—Vaccination Order—Non-compliance with Order—Burden of Proof—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

Upon the hearing of a summons under s. 31 of the Vaccination Act, 1867, against the parent of a child for non-compliance with an order of justices directing him to have his child vaccinated, the burden of proving non-compliance is upon the prosecution. Evidence that the certificate of vaccination required by the Act has not been received by the proper officer is primâ facie evidence from which non-compliance with the vaccination order may properly be presumed.

CASE stated by justices for the county of Surrey.

An information had been preferred by the respondent, a vaccination officer appointed by the guardians of the Farnham Union, charging that the appellant, being the parent of a certain child called Gilbert William Over, under the age of fourteen years, unlawfully omitted to carry into effect a certain order of a court of summary jurisdiction dated June 1, 1899, made pursuant to s. 31 of the Vaccination Act, 1867, whereby it was directed that the appellant should cause the said child to be vaccinated within twenty-eight days from the date thereof, the said period having expired, and the said child not having been so vaccinated, nor shewn to be unfit to be vaccinated, nor to be insusceptible of vaccination, contrary to s. 31 of the Act.

Upon the hearing of the case the respondent produced the original order of June 1, 1899, and deposed upon oath that he

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had not received any certificate of successful vaccination of the child, neither had he received any certificate that the child was unfit to be vaccinated nor to be insusceptible to vaccination. He admitted he had never seen the child the subject of the information. He also produced and submitted the register of vaccinations kept by him pursuant to s. 24 of the Vaccination Act, 1867, and the Acts amending the same. No other evidence was given on behalf of the prosecution, and no evidence was given on behalf of the appellant.

It was contended on behalf of the appellant that the evidence given by the respondent was not sufficient proof that the appellant was guilty of the offence alleged in the information. For the respondent it was contended that the evidence was sufficient proof that the appellant had not complied with the order.

The justices, having regard to the statutory provisions requiring under penalty every certificate of successful vaccination or of a child being unfit for or insusceptible of vaccination, if given by a public vaccinator to be transmitted by such public vaccinator, and if given by any other medical practitioner to be transmitted by the parent of such child, accepted the view of the respondent and convicted the appellant.

The question for the opinion of the Court was whether, upon the facts stated in the case, the decision of the justices was right in point of law.

Schultess Young, for the appellant. The burden of proving vaccination is not cast upon the defendant by s. 31 of the Vaccination Act, 1867 (1); it lies therefore upon the prosecution to prove the negative averment, as the disobedience

(1) By 30 & 31 Vict. c. 84 (The Vaccination Act, 1867), s. 31, a justice of the peace may, upon the information of the registrar or vaccination officer, order an unvaccinated child under fourteen who has not had the small-pox to be vaccinated within a certain time; "and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shewn to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings."

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charged in the summons amounted to a criminal neglect of duty: *Williams* v. *East India Co.* (1) The register was not evidence of non-vaccination. No presumption of non-vaccination arises from the fact that the appellant did not send a vaccination certificate to the registrar, for the parent is only required to do so where vaccination has been performed by a medical practitioner other than the public vaccinator. The prosecution should therefore have called the public vaccinator, and his evidence that he had not vaccinated the child would have been evidence from which non-compliance with the vaccination order might have been presumed. [He also cited *Allen* v. *Worthy*. (2)]

Ryde, for the respondent. There was evidence to justify the conviction. If the evidence of the vaccination officer was insufficient, that of the public vaccinator would not have been enough, for vaccination might have been performed by any registered medical practitioner. If vaccination has been performed, and the fact is not notified to the registrar, an offence is committed under the Act; the justices cannot presume, in the absence of affirmative evidence of vaccination, that that offence has been committed; and the evidence of the vaccination officer that he has not received the statutory certificate is therefore good presumptive evidence of non-compliance with the vaccination order.

CHANNELL J. I am clearly of opinion that this appeal should be dismissed. The case is not well stated; it omits to shew that the order, for non-compliance with which the appellant was summoned, was either served on him or was made in his presence (as to which, I think, though without deciding the question, that the latter would be sufficient); there is further a distinct allegation that no further evidence was given than that referred to in the case. It would seem therefore that there was no evidence before the justices upon either of these points; but it is abundantly clear that the question was raised whether sufficient evidence had been given of non-compliance with the vaccination order, and it is possible that there has been an

(1) (1802) 3 East, 192; 6 R. R. 589. (2) (1870) L. R. 5 Q. B. 163.

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oversight in the stating of the case; at any rate, we must take it for the purposes of this appeal that proof of service of the order was given, or that the point was not taken before the justices.

The substantial point which the case was intended to raise, and which we have to decide, is whether there was any evidence, not whether there was sufficient evidence, of the appellant's disobedience to the order. I agree that the burden of proof of non-compliance is upon the prosecution. It is not unusual in modern Acts of Parliament to provide that the burden of proving a particular fact shall be on the defendant; but that is not the case in the Vaccination Act, 1867, so far as regards the particular matter before us. In some matters under that Act the burden of proof is undoubtedly thrown on the defendant; for example, by the words "if the child . . . . shall not be shewn to be then unfit to be vaccinated or to be insusceptible of vaccination"; and as those words occur in the section under which these proceedings were taken they shew that it was not intended to place the burden on the defendant of shewing that he has had his child vaccinated; the proof of non-vaccination therefore lies on the prosecution. How is the proposition, which is a negative one, to be proved? If it were a civil proceeding, the burden of proof would undoubtedly be on the defendant, but that is not the rule in a criminal case, which the present apparently is; the prosecution therefore must give some evidence of the negative proposition, unless the question arises on some exception, exemption, proviso, excuse or qualification within the meaning of s. 39, sub-s. 2, of the Summary Jurisdiction Act, 1879. This is not a case within that sub-section, and it is necessary that some proof of non-vaccination should be given by the prosecution. Generally the only way of proving a negative is by presumption, and the Court has to apply the proper presumption. In the case of vaccination, machinery is provided under the Act whereby, if a child is vaccinated, the fact of vaccination is notified by various persons, and if no notification is made it can only be because some one has omitted to do his duty. The fact therefore that no notification of vaccination has been received by the proper

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officer is to my mind primâ facie evidence sufficient to satisfy the burden of proving the negative proposition that the child has not been vaccinated. That seems to me to be the only possible conclusion. Whether this is the best proof is a question with which we have nothing to do. If the public vaccinator were called, it would still be possible that another practitioner might have vaccinated the child, and the justices would still have to rely upon a presumption, and might refuse to act upon the presumption arising from the evidence of the public vaccinator. I think therefore that there was evidence before the justices upon which they were justified in acting as they did, and that this appeal should be dismissed.

BUCKNILL J. I agree.

Appeal dismissed.

Solicitor for appellant: *H. T. Nicholson.*

Solicitors for respondent: *Johnson, Weatherall & Sturt, for Potter & Crundwell, Farnham.*

W. J. B.

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—— From county court—Limited leave to appeal to Court of Appeal - - - 100
See LANDLORD AND TENANT. 1.

—— Notice of appeal—Poor-rate—Quarter sessions—Jurisdiction - - 521
See RATES. 1.

—— Official referee—Trial before—Application to Divisional Court—Leave to appeal
See PRACTICE. 1. 284

—— To quarter sessions—Order for maintenance—Practice - - - - 438
See POOR LAW.

APPORTIONMENT—*Rent, Annuities, Dividends, and other Payments in the nature of Income—Landlord and Tenant—Rent payable in Advance—Apportionment on Eviction—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.

The plaintiff let a house to the defendant at a yearly rent payable quarterly in advance. By the terms of the agreement, if the rent should be in arrear for fourteen days, or on breach by the defendant of any of the clauses of the agreement, the plaintiff was to be at liberty to re-enter on giving notice. A quarter's rent being in arrear, the plaintiff gave the required notice, and re-entered. In an action to recover the unpaid rent :—

Held, that the Apportionment Act, 1870, does not apply to rent, annuities, dividends, and other payments in the nature of income, which have accrued due before the happening of the event by reason of which it is proposed to apply the Act; that the Act, therefore, does not apply to rent payable in advance; and that the plaintiff was entitled to recover the whole amount. ELLIS *v.* ROWBOTHAM - - - C. A. 740

—— County boroughs—Contribution for special purpose—County rate basis—Agricultural rates - - - - 458
See RATES. 3.

ARBITRATION—Master and servant—Contract for service—Arbitration clause—Wrongful dismissal—Action for damages—Staying proceedings - - 339
See EMPLOYER AND WORKMAN. 1.

ARTIZANS' DWELLINGS—Valuation (Metropolis) Act, 1869—Gross value—Cost of lighting and cleaning common stair 138
See RATES. 2.

ASSESSMENT—Rates - - 733, 760
See RATES. 6, 7.

ASSETS—Assignment of—Defaulter—Rules of Stock Exchange—Set-off - - 701
See STOCK EXCHANGE.

—— Part payment of judgment debt—Subsequent receiving order—Benefit of execution - - - - - 264
See BANKRUPTCY. 1.

ASSIGNMENT—Assets—Defaulter—Rules of Stock Exchange—Set-off - 701
See STOCK EXCHANGE.

—— Leaseholds—Stamp duty—Consideration—Rent - - - - 172
See REVENUE. 9.

AUDITOR—Extent of duty of—Audit of accounts—Elective auditor of corporation—Remuneration - - - 16
See LOCAL GOVERNMENT. 1.

BALLAST—Obligation of shipowners to supply—Charterparty - - - 28
See SHIPPING. 3.

BANKRUPTCY—*Execution—Part Payment of Judgment Debt—Subsequent Receiving Order—Benefit of Execution—Assets—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-s.* 1.

By s. 45, sub-s. 1, of the Bankruptcy Act, 1883, an execution creditor is not entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order; by sub-s. 2 an execution against goods is completed by seizure and sale.

Execution having been issued upon a judgment for 80*l.* and costs, the sheriff on December 31, 1898, levied under a writ of fi. fa. On January 5, 1899, the debtor, under an arrangement with the solicitors of the execution creditors, paid the solicitors a sum of 40*l.* on account, and gave to the sheriff authority to re-enter under the writ of fi. fa. upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew. On January 14 a receiving order was made against the debtor on his own petition; at that date the sheriff had not re-entered under the writ of fi. fa.:—

Held, that the execution had not been completed as to the 40*l.* at the date of the receiving order, that the execution creditors were therefore not entitled to retain the benefit of the execution, and that the trustee in bankruptcy was entitled to the 40*l.* as part of the debtor's estate. *In re* FORD. *Ex parte* OFFICIAL RECEIVER - - - - Div. Ct. 264

2. —— *Receiving Order — Jurisdiction — Foreigner resident Abroad but Trading in England —Court of Bankruptcy—Act of Bankruptcy—Assignment for Benefit of Creditors generally executed Abroad—Notice of Suspension of Payment —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*), (*h*); *s.* 6, *sub-s.* 1 (*d*).

The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident out of the jurisdiction who, without himself coming within the jurisdiction, has carried on business, contracted debts, and has assets there, and has executed out of the jurisdiction an assignment of his property for the benefit of his creditors generally, or has given notice of suspension of payment to creditors within the jurisdiction. Such a person is not a "debtor" within the meaning of the Bankruptcy Act, 1883.

In re Pearson, [1892] 2 Q. B. 263, followed.

In re A. B. & Co. - - - C. A. 541

3. —— *Set-off—Mutual Debts or Dealings—Debtor and Creditor—Act of Bankruptcy—Receiving Order—Account of Mutual Dealings—Date for Taking Account — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

D., a solicitor, being at the time indebted to M., another solicitor, in a sum of 86*l.*, on December 24, 1892, committed an act of bankruptcy of which M. had no notice. On December 31, 1892, D. sold his business to M. under an agreement which fixed as the price a portion of the profits expected to be earned for three years from the business sold. Thereupon M. took possession of and carried on the business. On January 17, 1893, a receiving order was made against D., but no profits had then been earned from the business. At the end of the three years a sum of 300*l.* was found to be due from M. to D. under the agreement as the price of the business, and this sum M. paid to D.'s trustee in bankruptcy after deducting the 86*l.* due from D. to M. The trustee however objected that M. could not set off the 86*l.* against the 300*l.*; that he must pay the 300*l.* in full and be satisfied with a dividend on the debt of 86*l.*

The county court judge allowed the objection, and an appeal by M. to the Divisional Court (Wright and Bigham JJ.) was dismissed, the Court differing in opinion. On appeal by M., by leave, to the Court of Appeal:—

Held, that the dealings between M. and D. were "mutual dealings" within s. 38 of the Bankruptcy Act, 1883, and that M. was therefore entitled to set off the 86*l.* due to him from D. against the 300*l.* due from him to D.; also that the date of the receiving order, and not that of the act of bankruptcy, was the proper date at which to ascertain what those dealings were, so as to be capable of being made the subject of set-off under the section. *In re* DAINTREY. *Ex parte* MANT - - - - C. A. 546

4. —— *Trustee's Remuneration—Resolution of Creditors—Ultra Vires—Composition Provided by Debtor's Father—"Amount realized by Trustee"—Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict.*

BANKRUPTCY—*continued.*

c. 52), *s.* 72, *sub-s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-s.* 1.

Under s. 72 of the Bankruptcy Act, 1883, the remuneration of a trustee is to be fixed by a resolution of the creditors, and is to be a commission or percentage payable partly on "the amount realized" and partly on "the amount distributed in dividend"; and s. 15 of the Bankruptcy Act, 1890, enacts that the commission payable on the amount realized is to be payable "only on the amount realized by the trustee."

The creditors of a bankrupt accepted a composition, and the sum required to pay the composition was provided by his father and distributed by the trustee. The creditors also passed a resolution that the remuneration of the trustee should be a commission of "5 per cent. on all amounts brought to credit and 5 per cent. on all amounts distributed to the creditors." The trustee claimed the commission on the sum provided by the father as being an "amount brought to credit" of the estate:—

Held, that the resolution, not being in accordance with the terms of s. 72 of the Act of 1883, was ultra vires:

Held, also, that the words "the amount realized" in s. 72—apart from s. 15 of the Act of 1890—mean "the amount realized by the trustee"; that the sum provided by the father was not a sum "realized by the trustee," and, therefore, that the commission claimed was not payable.

Semble, the words "distribnted in dividend" in s. 72 mean "distributed in dividend out of assets realized by the trustee." *In re* CHRISTIE. *Ex parte* CHRISTIE - - - **Wright J. 5**

5. —— *Undischarged Bankrupt — After-acquired Property—Assignment by Bankrupt—Stop Order—Priority—Maintenance of Bankrupt.*

Interpleader issue raising the question as to who was entitled to a sum of 258*l.* paid into court in an action of *Tibbits* v. *Renton*. Tibbits had been adjudicated a bankrupt and was still undischarged. The claimant Mercer was his trustee in bankruptcy. Vans Colina also claimed the fund under an assignment from the bankrupt:—

Held, that as Renton had neither notice nor knowledge of Vans Colina's assignment, and Vans Colina had not obtained a stop order, the trustee by giving his notices and obtaining a stop order had obtained priority The amount of the allowance to be made out of the fund for the maintenance of the bankrupt discussed. MERCER *v.* VANS COLINA - - **Wright J. 130, n.**

6. —— *Undischarged Bankrupt — After-acquired Property—Personal Earnings—"Property of the Bankrupt"—Trustee, Right of—Maintenance of Bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Under s. 44 of the Bankruptcy Act, 1883, which vests in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before his discharge, all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family.

R., a professional billiard player, while an undischarged bankrupt, entered into a contract with a billiard-ball manufacturing company, whereby the company agreed to supply him annually for five years, free of cost, with 2000 billiard balls of their manufacture as and when required by him; and R. agreed that he would not, during the five years, play public billiard matches (not being championship matches) other than with balls manufactured and supplied by the company; but the contract did not impose any obligation on R. to play billiards at all. The company supplied R. during his bankruptcy with balls according to the contract, intending that he might sell them and apply the proceeds to his own use:—

Held, that under s. 44 of the Bankruptcy Act, 1883, the balls belonged to the trustee in bankruptcy, the evidence shewing that they were not wanted for R.'s support even if they could be regarded as personal earnings, as to which *quære*.

Appeal from Wright J. dismissed. *In re* ROBERTS - - - - **C. A. 122**

BARBER—Exercising "worldly labour, business, or work" on Sunday - - **725**
See SUNDAY OBSERVANCE.

"**BEDDING**" — Bedstead — Privileged from distress - - - - **729**
See LANDLORD AND TENANT. 2.

BILL OF LADING—Description of goods—"Marked and numbered as in margin"—Mistake - - - - **714**
See SHIPPING. 1.

BILL OF SALE—*Consideration, Statement of—Money "Now Paid"—Promissory Note not yet Due—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

A bill of sale stated the consideration of it to be a sum of money "now paid" by the grantee to the grantor. Of the money paid by the grantee to the grantor a part was, in pursuance of a previous agreement between them, applied by the grantor to the retirement of a promissory note then current upon which the grantor and grantee were jointly and severally liable:—

Held, that as the liability, to the satisfaction of which the money was agreed to be applied, was a liability to a third person and not to the grantee, the fact that the liability was not a debt already due did not render it obligatory to set out in the bill of sale the agreement as to the application of the money, and that the consideration of the bill was not untruly stated. *In re* WILTSHIRE. *Ex parte* EYNON - **Div. Ct. 96**

2. —— *Consideration, Statement of—Schedule—Specific Description of Farm Stock—Accordance with Form—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9.

A bill of sale given in consideration of a present advance is bad if it fails to contain an acknowledgment of the receipt of the money.

Where the chattels comprised in a bill of sale are of a kind which requires to be replaced from

BILL OF SALE—*continued.*
time to time by the substitution of other similar chattels, as in the case of the live stock on a farm, a more specific description of them in the schedule is necessary than in the case of chattels which do not require to be replaced with the same degree of frequency, such as the furniture of a house.

A bill of sale expressed the consideration to be a sum of money "now due and owing." In fact, part of the said sum was advanced contemporaneously with the execution of the deed. Part of the chattels comprised in the bill were described in the schedule as "Stock: 2 horses, 4 cows." There was no evidence that at the date of the bill there were any other horses or cows on the premises of the grantor:—

Held, that there was not such a specific description of the stock as to satisfy s. 4 of the Bills of Sale Act, 1882; and that the bill of sale was void on the grounds that the consideration was not truly stated, and that, as the bill omitted to acknowledge the receipt of the money then advanced, it was not in accordance with the statutory form. DAVIES *v.* JENKINS. HOWIE, CLAIMANT - - - - Div. Ct. 133

3. —— *Occupation — Non-description of — Registration—Validity—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

In a bill of sale given by a married woman living apart from her husband, and in the affidavit filed on registration, she was simply described as a married woman, no occupation being given. She was in fact employed as manager in a dressmaking business at a weekly salary:—

Held, that the registration of the bill was invalid, since her occupation ought to have been described. KEMBLE *v.* ADDISON. SPOONER, CLAIMANT - - - Div. Ct. 430

BREAD—*Sale otherwise than by Weight*—3 *Geo.* 4, *c. cvi. s.* 4.

By 3 Geo. 4, c. cvi. s. 4 (which applies in substance to the metropolitan area), any baker or seller of bread who sells or causes to be sold bread in any other manner than by weight is liable to a penalty.

The respondent, a grocer and general dealer, was asked by a purchaser for a twopenny loaf, and served him with a loaf for which he paid 2*d.* The loaf was not weighed in the shop in the purchaser's presence, nor was any statement made to him as to its weight, nor was there any evidence that it had ever been weighed. When subsequently weighed, the loaf, which resembled in shape and appearance a 2 lb. loaf, weighed 2¾ ozs. short of 2 lbs.:—

Held, that it was immaterial that the purchaser had not asked for a loaf of a specific weight, and that the respondent had sold bread otherwise than by weight within the meaning of the section. LONDON COUNTY COUNCIL *v.* READ Div. Ct. 288

BUILDING — Continuing offence — By-law — Builder without power to remedy breach
See LOCAL GOVERNMENT. 2. 324

—— Street—Commencing to form or lay out street without leave of county council
See LONDON. 3. 416

BUILDING—*continued.*
—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

CARGO—Charterparty—Contract to load a "cargo of say about 2800 tons" - - 691
See SHIPPING. 4.

CASES:—*Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, followed - - - - - 78
See RAILWAY.

—— *Attorney-General* v. *Fairley*, [1897] 1 Q. B. 698, followed - - - 156
See REVENUE. 1.

—— *Attorney-General* v. *Great Western Ry. Co.*, (1872) L. R. 7 Ch. 767, followed - 78
See RAILWAY.

—— *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*, (1882) 21 Ch. D. 752, followed - - - - 78
See RAILWAY.

—— *Booth* v. *Ferrett*, (1890) 25 Q. B. D. 87, overruled - - - - 401
See LODGING-HOUSE. 1.

—— *Bradley* v. *Dunipace*, (1862) 1 H. & C. 521, distinguished - - - 714
See SHIPPING. 1.

—— *Croysdale* v. *Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515, approved 584
See LOCAL GOVERNMENT. 3.

—— *Cuckfield Rural Council* v. *Goring*, [1898] 1 Q. B. 865, approved - - 1
See HIGHWAY. 1.

—— *Davis* v. *Starr*, (1889) 41 Ch. D. 242, explained - - - - 339
See EMPLOYER AND WORKMAN. 1.

—— *Doe* v. *Culliford*, (1824) 4 D. & R. 248, followed - - - - 23
See LANDLORD AND TENANT. 4.

—— *Doe* v. *Morphett*, (1845) 7 Q. B. 577, dissented from - - - - 23
See LANDLORD AND TENANT. 4.

—— *Gower* v. *Couldridge*, [1898] 1 Q. B. 348, explained - - - - 504
See COMPANY. 2.

—— *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142, followed - - - 752
See HIGHWAY. 2.

—— *Last* v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, considered 177
See REVENUE. 6.

—— *Morris* v. *Levison*, (1876) 1 C. P. D. 155, distinguished - - - 691
See SHIPPING. 4.

—— *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered 177
See REVENUE. 6.

—— *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698, approved of - - - - 744
See GAMING.

—— *Pearson, In re*, [1892] 2 Q. B. 263, followed
See BANKRUPTCY. 2. 541

CASES—*continued.*

—— *Reg.* v. *Kent Justices*, (1899) 80 L. T. (N.S.) 622, disapproved and not followed 521
See RATES. 1.

—— *Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, followed - - 339
See EMPLOYER AND WORKMAN. 1.

—— *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, explained - - 504
See COMPANY. 2.

—— *United Kingdom Mutual Steamship Assurance Association* v. *Nevill*, (1887) 19 Q. B. D. 110, distinguished - 299
See INSURANCE, MARINE.

—— *West London Syndicate* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507, distinguished - - - - 310
See REVENUE. 8.

—— *Wood* v. *London County Council*, (1895) 64 L. J. (M.C.) 276, overruled - 416
See LONDON. 3.

CERTIFICATE—Stamp—Scrip certificate—Payment by instalments — Receipts for future payments indorsed on certificate
See REVENUE. 10. 166

CHARITY—Common lodging-house — Liability to penalty for keeping—Charitable institution—Non-registration - 401, 617
See LODGING-HOUSE. 1, 2.

CHARTERPARTY—Construction.
See Cases under SHIPPING.

CHILDREN—Prevention of cruelty to—Evidence —Examination of defendant—Previous conviction - - - - 474
See CRIMINAL LAW. 2.

CITY OF LONDON COURT—Jurisdiction—Leave to issue process - - - 598
See LONDON. 1.

COHABITATION — Evidence of — Separation—Agreement — Intercourse while living apart - - - - - 9
See HUSBAND AND WIFE.

COMMISSION—Agreement by vendor to pay commission to purchaser's agent—Right of purchaser to recover from vendor 233
See VENDOR AND PURCHASER. 1.

COMMON LODGING-HOUSE — Non-registration —Penalty—Charitable institution
See LODGING-HOUSE. 1, 2. 401, 617

COMPANY — *Directors — Money paid out of Capital by Directors to Shareholders—Order on Directors to replace it—Right of Directors to Indemnity from Shareholders.*

Directors of a company, which had not obtained the sanction of the Court to a reduction of its capital, distributed a portion of the capital amongst the shareholders with their assent, and with notice of the fact that the money so distributed was part of the capital. The company was subsequently wound up, and the liquidator obtained an order that the directors should replace the money on the ground that the payment to the shareholders was ultra vires :—

COMPANY—*continued.*

Held, that the directors were entitled to an indemnity from the shareholders.

Decision of the Divisional Court, [1899] 1 Q. B. 480, affirmed. MOXHAM *v.* GRANT C. A. 88

2. —— *Prospectus—Practice — Shareholder—Fraudulent Prospectus—Action against Company and Directors—Causes of Action—Misjoinder—Separate Relief against Separate Defendants—"Actio Personalis Moritur cum Personâ"—Deceased Director—Legal Personal Representatives. Liability of — Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

Where an action is brought by a shareholder against the company and its directors for relief in respect of an improperly issued prospectus, the fact that the relief claimed against the several defendants may differ in detail is no ground for objection that the action is bad as joining separate causes of action against separate defendants, for in substance there is only one cause of action, namely, the improper issue of the prospectus. Neither is it improper to join in such an action the legal personal representatives of a deceased director alleged to have been a party to the issue of the prospectus.

Whether the maxim "Actio personalis moritur cum personâ" applies in the case of a deceased director who may have incurred liability under s. 3 of the Directors' Liability Act, 1890, *quære.*

Gower v. *Couldridge*, [1898] 1 Q. B. 348, and *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, explained. FRANKENBURG *v.* GREAT HORSELESS CARRIAGE CO. - - C. A. 504

—— Debenture—Stamp duty—Redemption on contingency—"Marketable security"
See REVENUE. 7. 217

COMPENSATION—Intention to use land for particular purpose—Special adaptibility
See LANDS CLAUSES ACTS. 722

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

CONDITION—Contract for sale—Time during which condition may be performed—Absence of express stipulation - 694
See VENDOR AND PURCHASER. 2.

—— Implied—Contract—Sale by description—Acceptance - - - - 513
See SALE OF GOODS.

CONSIDERATION—Statement of—Money "Now paid"—Promissory note not yet due 96
See BILL OF SALE. 1.

—— Statement of—Specific description of farm stock—Accordance with form - 133
See BILL OF SALE. 3.

CONTINGENCY—Redemption on—Debenture—Stamp duty - - - - 217
See REVENUE. 7.

CONTINGENT SETTLEMENT — "Settlement estate duty" - - - 156
See REVENUE. 1.

CONTRACT—*Principal and Agent—Sale of Goods —Ratification—Undisclosed Principal.*

A contract made by a person intending to contract on behalf of another, but without his

CONTRACT—*continued.*
authority, may be ratified by that other, and so made his own, although the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

So *held* by Collins and Romer L.JJ. (A. L. Smith L.J. dissenting. DURANT & Co. *v.* ROBERTS AND KEIGHLEY, MAXSTED & Co. - C. A. 629

—— Charterparty—Contract to load a "cargo of say about 2800 tons" - - 691
See SHIPPING. 4.

—— Sale—Lease of public-house—Time during which condition may be performed—Absence of express stipulation - 694
See VENDOR AND PURCHASER. 2.

—— Sale by description—Implied condition—Acceptance - - - - 513
See SALE OF GOODS.

—— Stamp—Conveyance on sale—Goodwill—Contract "made" in the United Kingdom - - - - - 310
See REVENUE. 8.

CONTRACTOR—Rateable occupation—Hoardings—Advertising contractor - - 389
See RATES. 4.

—— Sub-contractor — "Undertaker" — Workmen's Compensation Act - - 777
See EMPLOYER AND WORKMAN. 12.

CONTRIBUTIONS—Mutual insurance society—Insurance by agent, member of association—Shipowner not member—Liability
See INSURANCE, MARINE. 299

CONVERSION OF DOCUMENT — Damages — Measure of—Non-negotiable instrument—Money had and received - 270
See TROVER. 1.

CONVEYANCE — Stamp — Goodwill — Contract "made" in the United Kingdom 310
See REVENUE. 8.

CONVEYANCING AND LAW OF PROPERTY—Lease by mortgagor in possession—Foreclosure — Lease binding on mortgagee - - - - - 346
See MORTGAGE.

CONVICTION—Previous conviction—Evidence—Examination of defendant - 474
See CRIMINAL LAW. 2.

CORPORATION—Action against—Liability 22
See MALICIOUS PROSECUTION.

—— Elective auditor of corporation—Remuneration - - - - - 16
See LOCAL GOVERNMENT. 1.

CORRUPT PRACTICES — Prosecution for, at municipal election—Private prosecutor—Defendant's right to costs, where acquitted - - - - 605
See CRIMINAL LAW. 1.

COSTS—Appeal to quarter sessions—Payment by treasurer of county or borough—Vagrancy - - - - 291
See JUSTICES.

COSTS—*continued.*
—— Corrupt practices — Prosecution for, at municipal election—Private prosecutor—Defendant's right to costs where acquitted - - - - 605
See CRIMINAL LAW. 1.

—— Public authorities—Protection of—Action of trespass—Costs as between solicitor and client - - - - 535
See PRACTICE. 2.

—— Public authority — Action against — Discretion to deprive successful defendants of costs - - - - 357
See PRACTICE. 3.

—— Taxation — Solicitor employed at fixed annual salary - - - 434
See SOLICITOR.

COUNTY — Contribution for special purpose—County rate basis—Apportionment 458
See RATES. 3.

COUNTY COUNCIL—London County Council
See LONDON. 3, 4. 330, 416

COUNTY COURT—Appeal from—Limited leave to appeal to Court of Appeal - 100
See LANDLORD AND TENANT. 1.

—— City of London Court—Jurisdiction—Leave to issue process - - - 598
See LONDON. 1.

—— Distress — Privileged from — Bedstead — "Bedding" - - - - 729
See LANDLORD AND TENANT. 2.

COVENANT—Repairs—Occupation by cestui que trust—Liability of cestui que trust for breach of trustee's covenant - 116
See LANDLORD AND TENANT. 3.

CRIMINAL LAW—*Costs—Prosecution for Corrupt Practices at Municipal Election—Private Prosecutor — Defendant's Right to Costs where acquitted—Corrupt Practices Prevention Act*, 1854 (17 & 18 *Vict. c.* 102), *s.* 12—*Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 53—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 30.

Where a private prosecutor prefers an indictment charging the commission of a corrupt practice at a municipal election, the defendant, if acquitted of the charge, is entitled to recover from the prosecutor the costs sustained by reason of the indictment. THE QUEEN *v.* LAW
Bucknill J. 605

2. —— *Evidence—Examination of Defendant—Previous Conviction—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41)—*Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *ss.* 1, 6.

The appellant was charged before a court of summary jurisdiction with an offence under the Prevention of Cruelty to Children Act, 1894, and gave evidence on his own behalf as that Act permits. He was asked in cross-examination whether he had not been previously convicted of a similar offence, and answered that he had. The Criminal Evidence Act, 1898, s. 1, enables "every person charged with an offence" to give evidence on his own behalf; but (*f*) "a person charged and called as a witness in pursuance of

CRIMINAL LAW—*continued.*
this Act" shall not be asked or required to answer any question tending to shew that he has been convicted of any other offence than that with which he is charged. By s. 6, "this Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act."

The court of summary jurisdiction convicted the appellant:—

Held, that s. 1 of the Criminal Evidence Act, 1898, applied; that the evidence of the appellant's previous conviction was wrongly admitted, and, therefore, that the conviction was bad. CHARNOCK *v.* MERCHANT - - Div. Ct. 474

—— Malicious prosecution—Action against corporation—Liability - - 22
See MALICIOUS PROSECUTION.

CROWN—*Prerogative of—Action between Subjects involving Rights of the Crown—Transfer to Revenue Side—Information by Attorney-General—Stay of Proceedings.*

In an action of trespass in a county court against tenants of the Crown, a question affecting the rights of the Crown over certain land was involved. Judgment was given in the county court for the plaintiff for damages and an injunction, against which the defendants appealed. The Attorney-General then filed an information against the plaintiff praying for a declaration of the rights of the Crown in the matter:—

Held, that the Crown was entitled to an order for the transfer of the county court appeal to the revenue side of the Queen's Bench Division and for a stay of proceedings therein until after the hearing of the information. LORD STANLEY OF ALDERLEY *v.* WILD & SON - - C. A. 256

CRUELTY—Prevention of cruelty to children—Evidence—Examination of defendant—Previous conviction - - 478
See CRIMINAL LAW. 2.

CUSTOM — Charterparty—Construction—Extent of exclusion of custom - - 518
See SHIPPING. 6.

CUSTOMS AND INLAND REVENUE.
See REVENUE.

DAMAGES—Measure of—Conversion of document—Non-negotiable instrument—Money had and received - - - 270
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See PRACTICE. 1.

DOCK—*Control of Dock-master—Obstruction—Requisition—Penalty—Shipping—West India Docks Act*, 1831 (1 *& 2 Will. 4, c. lii.*), *s.* 101.

By s. 101 of the West India Docks Act, 1831, a penalty is imposed on every master or person in charge of any ship, lighter, &c., who places or suffers it to remain in the river Thames within 200 yards of any of the dock entrances, unless for the purpose of coming into or going out of the docks; and every master, &c., of any ship, barge, &c., so placed within such distance who does not immediately remove it from within such distance "on being thereunto required by the dock-master or dock-masters" is made liable to a fine for every hour that "such obstruction shall remain after such requisition made."

Notices requiring the removal of vessels from within the prohibited distance were signed beforehand in blank by the dock-master, and, upon a vessel mooring within that distance, the date and the name of the vessel were filled up by the lockman, who, if the person in charge refused to move, served him with the notice without consulting the dock-master as to the removal of that particular vessel:—

Held, that the notice, although only signed in blank by the dock-master and filled in by his subordinate, was a good requisition by the dock-master:

Held, further, that in order to constitute an offence under the section there need not be an actual or imminent obstruction to any particular ship or to the traffic generally, a vessel moored within the prohibited distance constituting (if not removed upon notice) an obstruction within the meaning of the section. DUCKHAM *v.* GIBBS Div. Ct. 394

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—— Loading from dock—Steam-winch on ship in dock loading from lighter alongside—Compensation - - - 491
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EMPLOYER AND WORKMAN—*Arbitration—Contract for Service—Arbitration Clause—Wrongful Dismissal—Action for Damages—Staying Proceedings—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

A contract for the employment of the plaintiff by the defendants as their agent for the sale of maize and other products for seven years, at a remuneration by commission, provided that "any dispute arising in connection with" the contract should be referred to arbitration pursuant to the arbitration clause in the by-laws of the Liverpool Corn Trade Association. The arbitration clause in those by-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators, and that neither contracting party should bring any action against the other in respect of any dispute until the dispute had been settled by the arbitrators. Disputes as to the plaintiff's conduct as agent were subsequently referred to arbitrators, who made an award adverse to the plaintiff, whereupon the defendants dismissed him. The plaintiff then brought an action against the defendants for damages for wrongful dismissal:—

Held, reversing Phillimore J., that the dispute in the action was within the arbitration clauses in the contract and by-laws, and that the defendants, having always been "ready and willing" to refer the dispute to arbitration, were entitled to have the action stayed under s. 4 of the Arbitration Act, 1889.

Renshaw v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, followed.

Davis v. *Starr*, (1889) 41 Ch. D. 242, explained. PARRY *v.* LIVERPOOL MALT COMPANY C. A. 339

2. —— *Compensation—"Accident"—Injury by—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

The word "accident," as used in the Workmen's Compensation Act, 1897, involves the idea of something fortuitous and unexpected.

Where a workman suffers injury while doing his ordinary work in his ordinary way, and the primary and efficient cause of the injury is his diseased or impaired physical condition at the time, the injury is not caused by accident within the meaning of the Act. Where, however, injury is caused to a workman by some fortuitous and external event, it is caused by accident within the meaning of the Act, although the injury may be aggravated by his physical condition at the time of the accident. HENSEY *v.* WHITE. LLOYD *v.* SUGG & Co. WALKER *v.* LILLESHALL COAL COMPANY - - C. A. 481

3. —— *Compensation—Building exceeding Thirty Feet in Height—Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

Internal communication between a building over thirty feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher and that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding thirty feet in height within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. RIXSON *v.* PRITCHARD & RENWICK - - - - C. A. 800

4. —— *Compensation—Dock—Loading from—Employment on, in or about a Factory—Machinery to which any Provision of the Factory Acts applies—Steam-winch on Ship in Dock loading from Lighter alongside—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

By s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, "factory . . . . includes any . . . . machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."

By s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts are to have effect "as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory."

A stevedore's labourer sustained injury by an accident while employed on board a steamer lying in dock in loading cargo on to the steamer from a lighter lying alongside; the cargo was lifted out of the lighter and lowered into the hold by means of a steam-winch on the ship's deck:—

Held, that loading from the lighter into the ship was not loading from the dock; that the steam-winch was not a factory, it not being machinery used in the process of loading from a dock, wharf, quay or warehouse within the meaning of s. 23 of the Factory and Workshop Act, 1895, and that the workman was not entitled to compensation under the Workmen's Compensation Act, 1897. HENNESSEY *v.* MCCABE C. A. 491

EMPLOYER AND WORKMAN—*continued.*

5. —— *Compensation—Dock—Repairs done to Ship in Dock—"Factory"—"Shipbuilding Yard"—"Premises in which Ships are made, finished or repaired"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93, *Sched. IV., Part II.* (24).

The fact that repairs are being done to a ship in a dock does not make the dock a "shipbuilding yard" within the meaning of the Factory and Workshop Act, 1878, Sched. IV., Part II. (24), and therefore a "factory" within the meaning of s. 7 of the Workmen's Compensation Act, 1897. SPENCER *v.* LIVETT, FRANK & SON - **C. A. 498**

6. —— *Compensation—Employment for less than Two Weeks — Employment to which Act applies — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1; *Sched. I., cl.* 1 (*b*).

In order to obtain the benefit of the Workmen's Compensation Act, 1897, a workman must have been for at least two weeks in the employment of the employer in whose service he has sustained the injury for which he seeks compensation. LYSONS *v.* ANDREW KNOWLES & SONS, LIMITED - - - - **C. A. 780**

7. —— *Compensation—Factory—Employment "about" a Factory—Personal Injury by Accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

Employment "about" a factory means employment about the locality of the factory, and does not include employment about the business of the factory at a distance from the factory itself.

A builder was erecting houses on a building estate which was in course of development; on the estate was a barn containing a steam-engine and mortar-mill, which were used for the purposes of the building operations, and which constituted a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. The respondent, a labourer in the builder's employment, whose duty it was to fetch water in a cart from a brook at some distance along the main road for the mortar-mill and buildings, was injured while returning with the cart at a spot about 110 to 160 yards distant from the engine and mortar-mill owing to the horse running away:—

Held, that there was no evidence upon which a county court judge could properly find that the employment of the respondent was employment "about" a factory within the meaning of the Act. FENN *v.* MILLER - - **C. A. 788**

8. —— *Compensation—Factory of a third party—Employment on or in or about a Factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The expression "employment by the undertakers . . . . on or in or about a . . . . factory" in s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, means employment by the undertakers on, in or about their own factory. A workman, therefore, who is sent by his employers on their business to the factory of a third party, and is there injured by accident, is not entitled to compensation under the Act. FRANCIS *v.* TURNER BROTHERS - - - - **C. A. 478**

EMPLOYER AND WORKMAN—*continued.*

9. —— *Compensation—Railway Refreshment Room—Employment to which Act applies—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.

Employment by a railway company in a railway refreshment room, to which the only entrance for the public is from the station platform, is not employment on or in or about a railway within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. MILNER *v.* GREAT NORTHERN RAILWAY COMPANY - **C. A. 795**

10. —— *Compensation—Scaffolding—Building constructed by means of a—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

A new house more than thirty feet high had been roofed in and workmen employed by the builder were plastering the walls and ceilings inside the house, for which purpose trestles and boards were being used. One of the men, while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, and was killed. At that time other workmen were at work plastering some of the rooms, and were standing on boards placed across trestles four feet high in order to enable them to reach the ceilings and upper part of the walls. A county court judge having awarded compensation to the widow of the deceased:—

Held, by A. L. Smith L.J. and Rigby L.J. (Collins L.J. dissenting), that there was evidence to justify a finding of the county court judge that the arrangement of trestles and boards was a scaffolding within the meaning of s. 7, sub-s. 1, of the Act, and that the employment of the deceased was therefore one to which the Act applied. MAUDE *v.* BROOK - - **C. A. 575**

11. —— *Compensation—"Undertaker"—Construction of Building—Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Where a building over thirty feet high is being constructed by means of a scaffolding, and the work of construction is being carried out by several persons not acting jointly, but each of them contracting with the building owner for the construction of a separate substantial part of the building, each of them is an "undertaker" within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and is liable to compensate the workmen employed by him for personal injury sustained by them in the course of their employment. Every workman employed by the undertaker upon the building is within the Act, whatever may be the nature of his own particular work. MASON *v.* A. R. DEAN, LIMITED **C. A. 770**

12. —— *Compensation—"Undertaker"—Subcontractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

A sub-contractor is not an undertaker within the meaning of the Workmen's Compensation Act, 1897. CASS *v.* BUTLER - - **C. A. 777**

EMPLOYER AND WORKMAN—*continued.*

13. —— *Compensation*—"*Wharf*"—*Timber-Yard*—*Employment on, in, or about a Factory*—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

For the purpose of unloading timber from timber-ships a dock board provided quay or wharf space running inland for 150 yards from the water's edge; at the further end of this space was a fence with gates at intervals, behind which came a series of yards leased by the dock board to different timber merchants for storing their timber, the whole being the property of the dock board, and separated by a wall from the surrounding property. A workman employed by a firm of carters was killed while moving a log of timber in one of the yards leased to a firm of timber merchants:—

Held, by A. L. Smith L.J. and Collins L.J. (Rigby L.J. dissenting), that the word "wharf" as used in s. 23 of the Factory and Workshop Act, 1895, and s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, must be construed in its ordinary and popular signification of a place contiguous to water over which goods pass in the process of loading and unloading, that the yard where the accident happened was not a wharf within the meaning of those sections, and that the employment of the deceased was therefore not one to which the Workmen's Compensation Act, 1897, applied. HADDOCK *v.* HUMPHREY **C. A. 609**

—— Shop Hours Act—Hotel—Domestic servant—Public-house - - - 665
See SHOP.

ESTATE DUTY - - **156, 223, 372, 442**
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ESTOPPEL—Surrender by operation of law—Determination of tenancy—Estoppel by conduct - - - - 426
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See CRIMINAL LAW. 2.

—— Of cohabitation—Separation—Agreement—Intercourse while living apart - 9
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EXECUTION—Assets—Part payment of judgment debt—Subsequent receiving order—Benefit of execution - - 264
See BANKRUPTCY. 1.

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See Cases under REVENUE.

FACTORY—Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

FINANCE ACTS.
See Cases under REVENUE.

FIRE HYDRANTS—Right of company to use—User without consent of London County Council - - - - 330
See LONDON. 4.

FORECLOSURE—Lease by mortgagor in possession binding on mortgagee - 346
See MORTGAGE. 1.

FOREIGNER—Receiving order—Jurisdiction—Foreigner resident abroad but trading in England - - - - 541
See BANKRUPTCY. 2.

FREIGHT—Advance freight—Payment—Charterparty—Destruction of part of cargo before sailing - - - 45
See SHIPPING. 2.

GAME—Lease—Sporting rights—Reservation severable as to ground game and winged game - - - - - 671
See LANDLORD AND TENANT. 5.

GAMING—*Wagering*—*Agreement by Way of*—*Recovery of Deposit from Stakeholder*—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109)—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

The Gaming Act, 1892, s. 1, does not prevent the recovery by the depositor from the stakeholder of money deposited to abide the event of a wager.

O'Sullivan v. *Thomas*, [1895] 1 Q. B. 698, approved of. BURGE *v.* ASHLEY & SMITH, LIMITED **C. A. 744**

GOODWILL—Stamp—Conveyance on sale—Contract "made" in the United Kingdom
See REVENUE. 8. **310**

GROUND GAME—Lease—Sporting rights—Reservation severable as to ground game and winged game - - - 671
See LANDLORD AND TENANT. 5.

GUARANTEE—Charterparty—Colliery guarantee—Strike clause—Colliery on strike
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HAWKER—Penalty—Sale by licensed hawker of goods for which licence unnecessary
See MARKET. **472**

HIGHWAY—*Repairable Ratione Tenuræ*—*Recovery of Expense of Repair*—*Person Liable*—*Owner not in Occupation*—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25, *sub-s.* 2.

By s. 25, sub-s. 2, of the Local Government Act, 1894, "Where a highway repairable ratione tenuræ appears . . . . not to be in proper repair, and the person liable to repair the same fails when requested so to do . . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing":—

Held, that an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the meaning of the section.

Cuckfield Rural Council v. *Goring*, [1898] 1 Q. B. 865, approved. DAVENTRY RURAL DISTRICT COUNCIL *v.* PARKER - - **C. A. 1**

2. —— *Trespass to Land*—*Use of Highway otherwise than as such.*

The plaintiff was possessed of land which was crossed by a highway. A trainer of race-horses

HIGHWAY—*continued.*
had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was one of the proprietors of a publication which gave accounts of the doings of race-horses in training. On the occasion in respect of which the action was brought he walked backwards and forwards on a portion of the highway on the plaintiff's land about fifteen yards in length for a period of about an hour and a half, watching and taking notes of the trials of race-horses on the plaintiff's land. The plaintiff having brought an action of trespass against him in respect of his user of the highway as aforesaid, and the jury having found for the plaintiff:—

Held, that the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public are entitled, and he therefore was guilty of a trespass on the plaintiff's land.

Harrison v. *Duke of Rutland*, [1893] 1 Q. B. 142, followed. HICKMAN *v.* MAISEY C. A. 752

—— Trespass—Action of—Public authorities protection—Costs as between solicitor and client - - - - 535
See PRACTICE. 2.

HOARDINGS—Rateable occupation—Advertising contractor - - - - 389
See RATES. 4.

HOTEL—Shop Hours Act—Domestic servant—Public-house - - - 665
See SHOP.

HUSBAND AND WIFE—*Separation—Agreement—Intercourse while Living Apart—Evidence of Cohabitation.*

Husband and wife entered into a deed of separation under which the husband covenanted to pay a weekly sum to the wife during their joint lives if they should so long live separate from one another. While they were living apart, acts of connubial intercourse took place. In an action by the wife to recover arrears of payments due under the deed:—

Held, that the fact that intercourse had taken place was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect. ROWELL *v.* ROWELL C. A. 9

HYDRANTS—Fire hydrants—Right of company to use—User without consent of London County Council - - - - 330
See LONDON. 4.

INCOME TAX—Deduction of income tax from interest or annuities - - 192
See REVENUE. 5.

—— Life insurance company—Participating policy-holders—Return of premium by way of bonus - - - 177
See REVENUE. 6.

INDEMNITY—Directors—Money paid out of capital to shareholders—Order on directors to replace it—Right to indemnity from shareholders - - - 88
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INFORMATION—Prerogative of Crown—Transfer to revenue side—Information by Attorney-General—Stay of proceedings
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INJUNCTION—Level crossing—Speed of trains—Evidence of injury to public not necessary - - - - 78
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INN—Shop Hours Act—Hotel—Domestic servant - - - - 665
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INSURANCE, LIFE—Income tax—Participating policy-holders—Return of premium by way of bonus—Annual profits or gains
See REVENUE. 6. 177

—— Policy—Estate duty—Settled property 442
See REVENUE. 3.

INSURANCE, MARINE — *Mutual Insurance Society—Action for Contributions—Insurance by Agent, Member of Association—Shipowner not Member—Liability.*

The plaintiffs, a mutual insurance association, sued the defendants for contributions or premiums payable in respect of an insurance of the defendants' ship in the plaintiffs' club.

By the policy, which was in the form of a Lloyd's policy, and subject to the plaintiffs' memorandum and articles of association and rules, the defendants' manager insured the ship in his own name, and for, and in the names of, all persons to whom the same might appertain. By the memorandum one of the objects of the association was the mutual insurance "of ships which the members may be authorized to insure in their own names." The articles defined a member as any person who, on behalf of himself, or of any other person, insures any ship in the association, and empowered a committee of the association to assess the members rateably in order to provide a fund to meet losses, and stipulated that the association should not be liable for losses, except to the extent of the fund which it could recover from members or persons liable. The rules provided for payment of premiums, for which the ships were to be assessed.

The defendants authorized the manager of their ship to enter her in the club, which he did, and he so became a member of the club, within the meaning of the plaintiffs' memorandum and articles of association, and personally liable to pay the contributions or premiums, which, under the articles of association and the rules, might be levied by the committee of the club. He became insolvent, and unable to pay, and the plaintiffs sued the defendants, as being the persons on whose behalf, and for whose benefit, the insurance was effected:—

Held, that the defendants, being owners of an insurable interest, were the persons for whom the insurance was affected, that there was nothing in the memorandum and articles of association, or the rules, to exclude their liability to pay the premiums, and the plaintiffs were entitled to recover.

United Kingdom Mutual Steamship Assurance Association v. *Nevill*, (1887) 19 Q. B. D. 110, distinguished. BRITISH MARINE MUTUAL INSURANCE COMPANY *v.* JENKINS - Bigham J. 299

JURISDICTION—City of London Court—Leave to issue process - - - 598
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—— Poor-rate — Appeal — Notice of — Quarter sessions - - - - 521
See RATES. 1.

—— Receiving order—Foreigner resident abroad but trading in England—Act of bankruptcy - - - - 541
See BANKRUPTCY. 2.

JUSTICES—*Costs of Appeal to Quarter Sessions—Payment by Treasurer of County or Borough—Vagrant Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 9.

By s. 9 of the Vagrant Act, 1824, upon an appeal to quarter sessions against a conviction under the Act, the justices in quarter sessions are empowered to order the treasurer of "the county, riding, division, or place in which the offence shall have been committed," to pay the prosecutor's costs.

A county borough had a separate commission of the peace, but not a separate court of quarter sessions. An appeal from a conviction under the Act by the borough justices having been successfully brought to the quarter sessions for the county, an order was made by quarter sessions upon the borough treasurer for payment of the prosecutor's costs:—

Held, that the word "place" in the section must be construed as ejusdem generis with "county, riding, division," and meant a place having a separate court of quarter sessions; and that the order of quarter sessions was therefore wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county. THE QUEEN *v.* WEST RIDING JUSTICES Div. Ct. 291

—— Bread—Sale otherwise than by weight 288
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—— Common lodging-house—Liability to penalty for keeping — Charitable institution — Non-registration - - 401, 617
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—— Continuing offence—By-law—Builder without power to remedy breach - 324
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—— Distress - - - - 100, 729
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—— Dock-master — Control of — Obstruction—West India Docks - - - 394
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—— Evidence — Examination of defendant — Previous conviction — Prevention of cruelty to children - - - 474
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—— Licensed hawker—Sale by, of goods for which licence unnecessary—Penalty 472
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—— Maintenance—Order for—Appeal to quarter sessions—Practice - - - 438
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—— Notice to quit—Yearly tenancy—"End of the current year" - - - 23
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—— School board—Disqualification of member—Sale of materials to contractor with board - - - - 279
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—— Street—Commencing to form or lay out, without leave of county council - 416
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—— Sunday observance — Barber — Exercising "worldly labour, business or work" on Sunday - - - - 725
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—— Vaccination—Non-compliance with order—Burden of proof - - - 803
See VACCINATION.

LAIRAGE—Rateable value—Evidence of receipts and expenditure—Admissibility of evidence - - - - 143
See RATES. 5.

LANDLORD AND TENANT—*Distress—Goods Impounded on Premises—Man in Possession—Distress for Rent Act*, 1737 (11 *Geo.* 2, *c.* 19), *s.* 10—*Practice—Appeal from County Court—Limited Leave to Appeal to Court of Appeal.*

Where goods distrained for rent by a landlord have been impounded on the premises under 11 Geo. 2, c. 19, s. 10, it is not requisite that any one on the landlord's behalf should be left in possession of the goods.

Decision of the Divisional Court, [1899] 1 Q. B. 470, affirmed.

In an appeal from a county court to a Divisional Court, leave to appeal on one point having been given by the Divisional Court, the Court of Appeal confined the argument to the point as to which leave to appeal had been given, and refused to allow the appellant to go into another point which had been raised in the county court and in the Divisional Court. JONES *v.* BIERNSTEIN - - - - - C. A. 100

2. —— *Distress—Things Privileged from Distress—Bedstead—"Bedding"—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

The "bedding" privileged from distress for

LANDLORD AND TENANT—*continued.*
rent under the Law of Distress Amendment Act, 1888, and the County Courts Act, 1888, includes a bedstead used by the tenant as part of his sleeping accommodation. DAVIS *v.* HARRIS
Div. Ct. 729

3. —— *Lease to Trustee—Covenant by Lessee to Repair—Occupation by Cestui que Trust—Liability of Cestui que Trust for Breach of Trustee's Covenant.*

A lease of a house contained a covenant by the lessee for himself and his assigns to repair, and also a declaration that the lessee held the premises in trust for the defendant. The defendant occupied the premises during the whole of the term, as it was intended by the parties that she should do, and she paid the rent. Upon the expiry of the term the premises were out of repair:—

Held, that the fact of the defendant having the beneficial interest in the lease did not, either by itself or coupled with the fact of occupation by her, create any equitable liability in her for the breach of the lessee's covenant. RAMAGE *v.* WOMACK - - - - Wright J. 116

4. —— *Notice to Quit—Yearly Tenancy—"End of the Current Year."*

A tenant held premises on a yearly tenancy from Lady Day to Lady Day. On March 24, 1898, her landlord gave her notice to quit and deliver up the premises "on June 24, 1898, or at the end of your current year's tenancy":—

Held, that the notice must be construed in accordance with the intention of the landlord, and that since it was impossible to suppose that it was intended to be a notice to quit on March 25, 1898, when the current year's tenancy expired, it must be taken to be a good notice to quit the premises on March 25, 1899.

Doe v. *Culliford*, (1824) 4 D. & R. 248, followed.

Doe v. *Morphett*, (1845) 7 Q. B. 577, dissented from. WRIDE *v.* DYER - - Div. Ct. 23

5. —— *Reservation of Sporting Rights—Reservation Severable as to Ground Game and Winged Game—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

Sect. 3 of the Ground Game Act, 1880, which makes void "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act," avoids them only so far as they are contrary to the provisions of the Act. Where, therefore, a lease of a farm contains a reservation to the lessor of the exclusive right of the lessor and his friends to enter upon the farm for the purpose of sporting, the reservation is severable; and, although void as to the ground game as being in contravention of the provisions of the Act, is nevertheless good as to the winged game. STANTON *v.* BROWN
Div. Ct. 671

6. —— *Surrender by Operation of Law—Determination of Tenancy—Estoppel by Conduct.*

The defendant was tenant to the plaintiff from year to year of a Lady Day holding. In December, being desirous of surrendering his tenancy at an earlier date than that for which he could then give a valid notice to quit, he

LANDLORD AND TENANT—*continued.*
entered into an oral agreement with the plaintiff to surrender at the following Midsummer. On the faith of this agreement the plaintiff, with the defendant's knowledge and assent, sold the premises to a purchaser with the right to possession at Midsummer. At Midsummer the defendant refused to give up possession; whereupon the plaintiff brought ejectment:—

Held, that the action was maintainable upon the grounds: (1.) that the agreement of December, although bad as an agreement to surrender by reason of its not being in writing, as required by the Statute of Frauds, amounted to an acceptance of a new tenancy to end at Midsummer, and that the acceptance of that new tenancy worked a surrender of the old one by operation of law; and (2.) that the defendant by his conduct in allowing the plaintiff to contract an obligation to his purchaser on the faith of the agreement was estopped from disputing that his original tenancy was one which terminated at Midsummer. FENNER *v.* BLAKE - - - Div. Ct. 426

—— Lease by mortgagor in possession—Foreclosure—Lease binding on mortgagee
See MORTGAGE. 346

—— Rent payable in advance—Apportionment on eviction - - - - 740
See APPORTIONMENT.

LANDS CLAUSES ACTS—*Compensation—Injurious Affection—Intention to use Land for particular Purpose—Special Adaptability.*

The claimants bought some land with the intention of building a school upon it, for which purpose it was specially adaptable. Before they had begun to build they received notice from a railway company to treat for the purchase of part of the land. In consequence of the construction of the railway the part of the land not taken by the company would be rendered less suitable for the purpose of a school; and there was no other site in the neighbourhood equally suitable for the purpose:—

Held, that in assessing the compensation payable to the claimants their intention to use the site for a school ought to be taken into consideration, although they had done nothing towards carrying that intention into execution. BAILEY *v.* ISLE OF THANET LIGHT RAILWAYS COMPANY
Div. Ct. 722

LEASE.
See Cases under LANDLORD AND TENANT.

LEASEHOLDS—Stamp duty—"Conveyance or transfer on sale"—Assignment—Consideration—Rent - - - 172
See REVENUE. 9.

LEVEL CROSSING—Speed of trains—Injunction—Evidence of injury to public not necessary - - - - 78
See RAILWAY.

LIFE ASSURANCE—Income tax—Participating policy-holders—Return of premium by way of bonus—Annual profits or gains
See REVENUE. 6. 177

—— Policy—Estate duty—Settled property 442
See REVENUE. 3.

LIGHTING—Valuation (Metropolis) Act, 1869—Gross value—Artizans' dwellings—Cost of lighting and cleaning common stair *See* RATES. 2. 138

LIVERPOOL—Railway—Rates—Exemptions—Liverpool Corporation Act - 760 *See* RATES. 6.

LOCAL GOVERNMENT—*Audit of Accounts—Extent of Duty of Auditor—Elective Auditor of Corporation—Remuneration—Local Authority—Municipal Corporation—Urban Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 246—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 25.

The duty of an auditor of an urban sanitary authority in auditing the accounts of the authority is not confined to ascertaining whether there are vouchers for each item of the accounts submitted to him, but extends to investigating whether the payments represented by the vouchers are authorized, or are without authority, or otherwise illegal or improper.

Elective auditors of a municipal borough are not entitled to remuneration for their services. THOMAS *v.* DEVONPORT CORPORATION - **C. A. 16**

2. —— *Offences—Continuing Offence—Work executed in Contravention of By-law—Continuance in same State—Builder without Power to remedy Breach—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

By the Public Health Act, 1875, s. 158, where the execution of any work is an offence, in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence.

A builder was convicted for building a house without sufficient air space, contrary to a by-law. The builder was not the owner, and had not been in possession, nor had any right to go on the premises after the conviction. Afterwards the builder was prosecuted for a continuing offence in respect of the continuance of the work in the same state, in contravention of the by-law, and convicted.

On a case stated:—

Held, that the builder, having no power to remedy the breach complained of, was not guilty of a continuing offence, and the conviction was wrong. WELSH & SON *v.* WEST HAM CORPORATION - - - - - **Div. Ct. 324**

3. —— *Sewer—Vesting in Local Authority—"Sewers made by any Person for his own Profit"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-s.* 1.

A drain was made by the owner of a quarry for the purpose of collecting and carrying off surface water coming on to his land and preventing it from running over the quarry. By means of the drain the quarry could be more economically and conveniently worked than if the water were allowed to spread over it:—

Held, that the drain was a sewer made by a person for his own profit within the meaning of s. 13, sub-s. 1, of the Public Health Act, 1875, and did not vest in the local authority of the district.

LOCAL GOVERNMENT—*continued.*

Decision of the Queen's Bench Division, [1899] 1 Q. B. 979, reversed.

Croysdale v. *Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515, approved. SYKES *v.* SOWERBY URBAN DISTRICT COUNCIL - **C. A. 584**

—— Poor-rate—Appeal—Notice of—Quarter sessions—Jurisdiction - - **521** *See* RATES. 1.

—— Public authorities protection—Costs as between solicitor and client—Highway—Action of trespass - - **535** *See* PRACTICE. 2.

—— Rates—County boroughs—Contribution for special purpose—Apportionment—Agricultural rates - - - **458** *See* RATES. 3.

—— Repairable ratione tenuræ—Recovery of expense of repair—Person liable—Owner not in occupation - - - **1** *See* HIGHWAY. 1.

—— Revising barrister—Jurisdiction—Parochial electors' list—Ownership and occupation claims - - - **103** *See* PARLIAMENT.

LODGING-HOUSE — *Common Lodging-house—Liability to Penalty for Keeping—Charitable Institution—Non-registration—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict. c.* 41).

Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging-house, unless his name as the keeper thereof be entered in the register kept under" the Common Lodging Houses Act, 1851.

The respondent kept a house or "shelter" for the reception of male lodgers as part of a social scheme carried on by a body called the Salvation Army, the lodgers being admitted by the officials in charge under certain regulations made for the carrying out of the objects of the scheme. The lodgers were charged 4*d.* a night or 2*s.* a week for a bed or bunk in an open dormitory and the use in common with the other occupants of a sitting or meeting room and a kitchen; the occupants provided their own food, which they might cook at the kitchen fire. The officials in charge had a discretionary power to admit persons for a less payment or for no payment at all. Drunken or disorderly men were not admitted, or, if admitted, were turned out, the occupants being of the same class as the occupants of common lodging-houses, except that some of those received were so dirty that they would not be received in a common lodging-house. The shelter was kept for charitable or religious objects, and not for purposes of gain; the charges were the same as at common lodging-houses kept for commercial profit, but no profit was in fact made out of the shelters carried on under the scheme. The respondent's name was not entered in the register of common lodging-houses as the keeper of the shelter:—

Held, that the fact that the shelter was kept for charitable or religious objects and not for purposes of gain did not take it out of the operation of the Common Lodging Houses Acts, 1851 and 1853; that the shelter was a common lodging-

LODGING-HOUSE—*continued.*

house within the meaning of those Acts, and that the respondent had been guilty of the offence of keeping a common lodging-house without having his name registered as the keeper thereof.

Booth v. *Ferrett*, (1890) 25 Q. B. D. 87, overruled. LOGSDON *v.* BOOTH - **Div. Ct. 401**

2. —— *Common Lodging-house—Liability to Penalty for Keeping — Charitable Institution—Non-registration—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict. c.* 41).

Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging-house unless his name as the keeper thereof be entered in the register kept under" the Common Lodging Houses Act, 1851.

The respondent kept a house for the reception of male lodgers which was not carried on for the sake of making a profit, but solely for the purpose of assisting the poorer classes. The lodgers were charged 6*d.* or 8*d.* a night, and for this each lodger got the use of a common dining-hall and sitting-room and the right to the exclusive occupation of a cubicle which contained a bed, and which was separated from the rest of the dormitory by walls about 6½ feet high made of tiles. A certain number of the lodgers were of a better class than the inhabitants of an ordinary common lodging-house, but substantially the lodgers were of that description. Drunken and disorderly men, and men who were suspected of being criminals or verminous, were not admitted, but all other men were admitted on payment. The house was not registered as a common lodging-house:—

Held, that since the inmates of the house were persons of the poorer class who were likely to be in a dirty and insanitary condition, and since they occupied at least part of the house in common, it was a common lodging-house within the meaning of the Common Lodging Houses Acts, 1851 and 1853, and ought to have been registered. LOGSDON *v.* TROTTER **Div. Ct. 617**

LONDON—*City of London Court—Jurisdiction—Cause of Action arising in City of London—Leave to Issue Process—London (City) Small Debts Extension Act*, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39 (*Local*)—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.

Process in an action in the City of London Court may be issued without leave of the judge or registrar where the defendant does not dwell or carry on business in the City of London, but the cause of action arose wholly or in part therein. In this respect s. 74 of the County Courts Act, 1888, does not repeal s. 39 of the London (City) Small Debts Extension Act, 1852. FELTON *v.* BOWER & Co. - - - **Div. Ct. 598**

2. —— *Rates — Quinquennial Valuation — Provisional Valuation List—Supplemental Valuation List—Alteration in Valuation of Hereditament—Onus of Proof—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.

In order to justify an alteration of the quinquennial valuation of a hereditament by a provisional or supplemental valuation list under the Valuation (Metropolis) Act, 1869, ss. 46, 47, there must have been an alteration in the value of the

LONDON—*continued.*

hereditament from circumstances peculiar to the particular hereditament, or a class of hereditaments to which it belongs; an alteration in the value of the hereditament arising from a cause which affects the value of all the hereditaments in the list in common, such as a general rise in value produced by general prosperity, will not justify an alteration of the valuation of the hereditament during the quinquennial period.

The onus of shewing that an alteration in value is peculiar to the particular hereditament or class of hereditaments lies upon the authority seeking to alter the valuation. Therefore, mere proof of the rise in value of a hereditament without shewing that this arises from circumstances peculiar to it or a class of hereditaments to which it belongs will not justify an alteration of the valuation during the quinquennial period. ELLIS *v.* CAMBERWELL ASSESSMENT COMMITTEE **C. A. 68**

3. —— *Street—Commencing to form or lay out Street without Leave of County Council—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.

In order that a road or carriageway may be a street within the meaning of s. 7 of the London Building Act, 1894, it is not necessary that it should be intended or used for public carriage traffic.

The owner of a building estate, of about four acres in extent, commenced to lay out a road which communicated at one end with a public carriageway; the other end of the road ran into a square, about which it was intended to build a continuous line of houses or flats; houses or blocks of flats were also to be built along each side of the road itself, the total length of the road being about 600 feet. It was further intended to erect gates at the point where the road ran out of the public carriageway, and to keep a porter to open and shut the gates. The road was not intended for public use, but solely for the use of the occupiers of the houses in the road and square, and of their visitors and tradespeople. The owner had not obtained the consent of the London County Council before commencing the work:—

Held, that the road was a street within the meaning of s. 7 of the London Building Act, 1894, and that the owner was properly convicted under that section of having commenced to form or lay out a street for carriage traffic without having first obtained the sanction of the London County Council.

Wood v. *London County Council*, (1895) 64 L. J. (M.C.) 276, overruled. ARMSTRONG *v.* LONDON COUNTY COUNCIL - - **Div. Ct. 416**

4. —— *Waterworks—Fire Hydrants—Right of Company to Use—User for Purposes other than extinguishing Fires—User without Consent of London County Council—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 3, 37-43—*Metropolitan Fire Brigade Act*, 1865 (28 & 29 *Vict. c.* 90), *s.* 32—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 34—*London County Council (General Powers) Act*, 1894 (57 & 58 *Vict. c. ccxii.*), *s.* 4.

Hydrants, fire-plugs, and other apparatus, provided by a metropolitan waterworks company, pursuant to the Metropolitan Fire Brigade Act,

LONDON—*continued.*
1865, s. 32, and the Metropolis Water Act, 1871, s. 34, for supply of water in case of fire, may be used by the waterworks company, for purposes other than the supply of water for extinguishing fires, cleansing sewers and drains, cleansing and watering streets, or supplying public pumps, baths, and washhouses, without the consent of the London County Council, and may, by permission of the company, be used by persons other than the company. LONDON COUNTY COUNCIL *v.* EAST LONDON WATERWORKS COMPANY
Div. Ct. 330

—— Metropolitan police courts — Appeal to quarter sessions—Order for maintenance —Practice - - - - 438
See POOR LAW.

—— Poor-rate—Valuation (Metropolis) Act, 1869 —Gross value—Artizans' dwellings— Cost of lighting and cleaning common stair - - - - - 138
See RATES. 2.

MACHINERY—Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

MAGISTRATES.
See JUSTICES.

MAINTENANCE—Order for—Appeal to quarter sessions—Practice - - - 438
See POOR LAW.

—— Undischarged bankrupt — After-acquired property - - - 122, 130, n.
See BANKRUPTCY. 5, 6.

MALICIOUS PROSECUTION—*Action against Corporation—Liability.*
Conceded at the bar that an action for malicious prosecution will lie against a corporation.
Decision of Darling J., [1899] 1 Q. B. 392, affirmed. CORNFORD *v.* CARLTON BANK, LIMITED
C. A. 22

MARINE INSURANCE - - - 299
See INSURANCE, MARINE.

MARKET — *Sale within Prescribed Limits — Licensed Hawker—Exemption—Sale by Licensed Hawker of Goods for which Licence unnecessary —Penalty—Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.
A licensed hawker, although he is selling goods for which a hawker's licence is not required, is "a licensed hawker" within the meaning of s. 13 of the Markets and Fairs Clauses Act, 1847, and, therefore, is not liable to the penalty imposed by the Act upon every person "other than a licensed hawker" who, after the market-place is open for public use, sells within the prescribed limits articles in respect of which tolls are by the special Act authorized to be taken in the market. LLANDUDNO URBAN DISTRICT COUNCIL *v.* HUGHES
Div. Ct. 472

MASTER AND SERVANT.
See Cases under EMPLOYER AND WORKMAN.

MAXIM OF LAW—"Actio personalis moritur cum personâ" - - - 504
See COMPANY. 2.

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See LONDON.

MINES — Charterparty — Colliery guarantee — Strike clause—Colliery on strike 526
See SHIPPING. 5.

MISJOINDER—Fraudulent prospectus—Action against company and directors—Causes of action - - - - 504
See COMPANY. 2.

MISTAKE—*Money paid under Compulsion of Law—Money credited in Claim—Receipt in Full given—Want of bona fides—Action for Recovery of Money.*
The plaintiffs sued the defendant for work and labour done. In the writ they by mistake credited the defendant with the payment of a sum on account and claimed the balance. The defendant knowing that they had made a mistake paid the balance and obtained from them a receipt for the whole sum due from him to them. Subsequently, having discovered their mistake, the plaintiffs brought an action to recover from the defendant the sum wrongfully credited to him, as money had and received to their use :—
Held, that, although the receipt had been given under compulsion of legal process, the defendant could not rely upon it as a defence to the action since he had not acted bonâ fide, and that the plaintiffs were therefore entitled to recover the sum claimed. WARD & Co. *v.* WALLIS
Kennedy J. 675

—— Bill of lading—Description of goods — "Marked and numbered as in margin"
See SHIPPING. 1. 714

MONEY HAD AND RECEIVED—Conversion of document—Measure of damages—Non-negotiable instrument - - 270
See TROVER. 1.

MORTGAGE—*Lease by Mortgagor in Possession— Mansion-house, Furniture, and Sporting Rights— Foreclosure—Lease binding on Mortgagee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.
A mortgagor of land while in possession leased for fourteen years the mortgaged mansion-house, together with the furniture and with sporting rights over the whole of the mortgaged land. The mortgagees having foreclosed :—
Held, that the lease was valid as against the mortgagees under s. 18 of the Conveyancing Act, 1881. BROWN *v.* PETO - - Bigham J. 346

MUNICIPAL CORPORATION—Elective auditor of corporation—Remuneration - 16
See LOCAL GOVERNMENT. 1.

MUNICIPAL ELECTION—Prosecution for corrupt practices at—Private prosecutor—Defendant's right to costs where acquitted
See CRIMINAL LAW. 1. 605

MUTUAL INSURANCE—Action for contributions —Liability - - - - 299
See INSURANCE, MARINE.

NOTICE—Of appeal—Poor-rate—Quarter sessions —Jurisdiction - - - 521
See RATES. 1.

NOTICE—*continued.*
—— To quit—Yearly tenancy—"End of the current year" - - - 23
See LANDLORD AND TENANT. 4.

OBSTRUCTION—Control of dock-master—West India Docks - - - 394
See DOCK.

OFFENCES — Continuing offence — By-law — Builder without power to remedy breach
See LOCAL GOVERNMENT. 2. 324

OFFICIAL REFEREE—Trial before—Application to Divisional Court — Leave to appeal - - - - 284
See PRACTICE. 1.

PARLIAMENT—*Revising Barrister — Jurisdiction—Parochial Electors' Lists—Ownership and Occupation Claims—Parliamentary and Local Government Registration—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73)—*Registration Order*, 1895—*Forms.*

The Local Government Act, 1894, imposes upon a revising barrister the duty of revising, in counties, lists of persons entitled, in respect of their ownership of property in a parish, to vote as parochial electors only; also lists of persons claiming to have their names entered on the ownership part of the separate list of parochial electors of the parish, and lists of persons claiming to have their names entered on the separate list of parochial electors in respect of their occupation of property in the parish. THE QUEEN *v.* NASH - - - - - **Div. Ct. 103**

PARTIES—Misjoinder—Fraudulent prospectus —Action against company and directors —Causes of action - - - 504
See COMPANY. 2.

PENALTY—Common lodging-house — Liability for keeping—Charitable institution—Non-registration - - 401, 617
See LODGING-HOUSE. 1, 2.

—— Obstruction—Control of dock-master—Requisition—West India Docks - 394
See DOCK.

—— Sale by licensed hawker of goods for which licence unnecessary - - 472
See MARKET.

PENSION—Special-duty allowance — "Annual pay" - - - - 680
See POLICE.

PHARMACY ACTS—*Sale of Poisons—Order taken by Agent—"Seller"—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.

Sect. 15 of the Pharmacy Act, 1868, imposes a penalty upon any person "who shall sell" poisons without being duly qualified. The defendant, who kept a florist's shop at Worcester and was not duly qualified to sell poisons, took from one of his customers an order for a "weed-killer," manufactured by a limited company at Liverpool and containing poison. The defendant did not keep any of the weed-killer in stock; but, in accordance with his usual practice, took the order, received from the customer the price of the quantity ordered, gave him a receipt, and forwarded the order to the company at Liverpool, who thereupon supplied the customer with the weed-killer. The defendant received from the company a commission of 25 per cent. in respect of all sales effected on orders sent to them by him. In an action for a penalty under s. 15:—

Held, that there was evidence to support a finding that the defendant was not the person who had the conduct and management of the sale, and, therefore, that he was not the seller of the poison within the meaning of the Act. PHARMACEUTICAL SOCIETY *v.* WHITE **Div. Ct. 454**

POISON—Sale of — Order taken by agent — "Seller" - - - - 454
See PHARMACY ACTS.

POLICE — *Pension — Special-duty Allowance — "Annual Pay"—Police Act*, 1890 (53 & 54 *Vict. c.* 45), *Sched.* 1., *Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years' approved service is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A constable was appointed by the commissioners of police to attend permanently on special duty at the House of Lords. For that special duty, which he discharged for several years up to the time of his retirement, he received the sum of 1*s.* a day in addition to his ordinary pay:—

Held, by Channell J. (Bucknill J. dissenting), that the extra remuneration for the special duty formed no part of his "pay" for the purposes of the calculation of his pension:

Held, further, by Channell and Bucknill JJ., that for the purposes of calculating pension "annual pay" means three hundred and sixty-five times the amount of the daily pay, not fifty-two times the amount of the weekly pay. UPPERTON *v.* RIDLEY - - - **Div. Ct. 680**

POLICY — Income tax — Participating policy-holders—Return of premium by way of bonus—Annual profits or gains - 177
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—— Life insurance—Estate duty—Settled property - - - - 442
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POOR LAW—*Practice—Appeal to Quarter Sessions—Order for Maintenance*—43 *Eliz. c.* 2—*Order to pay 2s. 6d. a Week—Sum adjudged to be paid more than 3l.—Metropolitan Police Court Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 50.

An order of a metropolitan police magistrate to pay 2*s.* 6*d.* weekly towards the relief and maintenance of a certain pauper for and during so long a time as she shall be chargeable is not an order in which the sum adjudged to be paid is more than 3*l.*, so as to give a right of appeal to quarter sessions under s. 50 of 2 & 3 Vict. c. 71. THE QUEEN *v.* LONDON JUSTICES. *Ex parte* GREENWICH UNION - - - **Div. Ct. 438**

POOR-RATES.
See Cases under RATES.

PRACTICE — *Appeal — Trial before Official Referee — Application to Divisional Court — Appeal from Divisional Court—Leave to Appeal —Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5.

Where an action has been referred to an official referee, a motion to a Divisional Court to review the findings of the official referee and to enter judgment accordingly is "an appeal to the High Court from any Court or person" within the meaning of s. 1, sub-s. 5, of the Judicature Act, 1894, and the decision of the Divisional Court is therefore final, unless leave be given to appeal. DAGLISH *v.* BARTON - - C. A. 284

2. —— *Costs—Public Authorities, Protection of—Act done in Execution of Act of Parliament—Public Highway—Action of Trespass—Costs as between Solicitor and Client—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*) *—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

A landowner denying that a road over his land was a public highway, and threatening proceedings against any person using it, two officials of the county council were directed by the council, acting under the provisions of the Local Government Act, 1894, s. 26, to use the road for the purpose of formally testing the right, which they accordingly did. The landowner thereupon brought an action of trespass against them, but at the trial it was found that the road was a public highway, and judgment was given for the defendants:—

Held, that, the acts in respect of which the action was brought having been done by the defendants in pursuance or execution or intended execution of the Local Government Act, 1894, s. 26, the case came within the Public Authorities Protection Act, 1893, s. 1, and therefore the defendants were entitled to costs to be taxed as between solicitor and client under that section. GREENWELL *v.* HOWELL - - C. A. 535

3. —— *Costs — Public Authority — Action against—Discretion to deprive Successful Defendants of Costs—Rules of Supreme Court, Order* LXV., *r.* 1*—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

Where upon the trial of an action, brought against a person for an act or default in the execution of a statutory or other public duty, judgment is entered for the defendant, the discretionary power which is given to the judge by Order LXV., r. 1, to deprive the defendant of his costs is not taken away by s. 1 (*b*) of the Public Authorities Protection Act, 1893, which provides that, "Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." BOSTOCK *v.* RAMSEY URBAN DISTRICT COUNCIL
Lord Russell of Killowen C.J. 357

—— Appeals.
See also under APPEAL.

—— Costs.
See also under COSTS.

—— Parties—Misjoinder - - - 504
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PREROGATIVE OF CROWN—Transfer of action to revenue side—Information by Attorney-General—Stay of proceedings 256
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PREVENTION OF CRUELTY TO CHILDREN—Evidence—Examination of defendant—Previous conviction - - 474
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PRINCIPAL AND AGENT—Sale of goods—Ratification—Undisclosed principal - 629
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PRIORITY—After-acquired property of bankrupt —Stop order—Assignment by bankrupt
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PRIVILEGE—Distress—Bedstead—"Bedding"
See LANDLORD AND TENANT. 2. 729

PROCESS—Leave to issue—City of London Court —Jurisdiction - - - 598
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PROSPECTUS — Fraudulent prospectus—Action against company and directors—Causes of action—Misjoinder - - 504
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RAILWAY—*Level Crossing—Speed of Trains—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 48—*Infringement of Statute by Public Body—Information by Attorney-General—Injunction—Injury to Public, Evidence of not necessary.*

Upon an information filed by the Attorney-General to restrain a public body with statutory powers from infringing a term introduced into their Act in the interests of the public, as a condition of the exercise of their powers, it is not necessary to prove that injury to the public results from that infringement.

A railway company was by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, empowered to carry their railway across a turnpike road on the level. They constantly drove their trains over the level crossing, which adjoined a station, at a speed exceeding four miles an hour, in contravention of the provisions of s. 48 of the Railways Clauses Consolidation Act, 1845.

On an information filed by the Attorney-General to restrain them from so doing, they set up by way of defence that there was no proof of any injury occasioned to the public by their contravention of the section, and that the inconvenience caused to the public by reason of the existence of the crossing would be increased if they complied with it:—

Held (affirming the judgment of Bruce J.), that, as the information was filed by the Attorney-General to enforce the express terms of an enactment made by the Legislature in the interests of the public, the Court could not entertain the question whether injury to the public was in fact occasioned by the contravention of the Act, but were bound to grant the injunction.

Attorney-General v. *Great Western Ry. Co.*, (1872) L. R. 7 Ch. 767, *Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, and *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*, (1882) 21 Ch. D. 752, followed. ATTORNEY-GENERAL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - **C. A. 78**

—— Rates—Exemptions—Land used as railway for public conveyance—Liverpool Corporation Act - - - **760**
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—— Workmen's Compensation Act—Railway refreshment room - - - **795**
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RATES—*Appeal—Notice of Appeal—Procedure—Quarter Sessions—Jurisdiction—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 33.

By the Poor Relief Act, 1743, s. 4, any person aggrieved by any poor-rate may appeal to quarter sessions, "giving reasonable notice to the churchwardens or overseers."

By the Local Government Act, 1894, s. 33, sub-s. 1, "The Local Government Board may, on the application of the council of any municipal borough . . . . make an order conferring on that council . . . . any powers or liabilities of overseers."

An order was made under this section transferring to the council of a borough the powers, duties, and liabilities of the overseers with respect to appeals in respect of the poor-rate.

The recorder of the borough decided that he had no jurisdiction to hear an appeal to quarter sessions against a poor-rate, on the ground that notice of appeal had not been given to the town council:—

Held, that notice to the town council was not a condition precedent to hearing the appeal, that the recorder had jurisdiction, and a mandamus commanding him to hear the appeal granted.

Reg. v. *Kent Justices*, (1899) 80 L. T. (N.S.) 622, disapproved and not followed. THE QUEEN *v.* DE GREY - - - - **Div. Ct. 521**

RATES—*continued.*

2. —— *Artizans' Dwellings—Charge to Tenants for Cost of Lighting and Cleaning Common Stair—Gross Value—Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 4.

The owner of a block of artizans' dwellings, consisting of separate tenements, the access to which was by means of a common stair, let the tenements upon the terms of the tenants paying a certain weekly sum by way of rent, and also a further sum for the lighting and cleaning of the common stair:—

Held, that, for the purpose of arriving at the gross value of the tenements under the Valuation (Metropolis) Act, 1869, the sum paid for lighting and cleaning the stair must be added to the rent reserved. PULLEN *v.* ST. SAVIOUR'S UNION **Div. Ct. 138**

3. —— *County—County Boroughs—Contribution for Special Purpose—County Rate Basis—Apportionment—Local Act—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 33—*Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 9—*Agricultural Rates Act*, 1896, *Orders*, *Art.* XVII.

By a local Act, passed in 1891, the lunatic asylums board of a county containing county boroughs were directed to raise in every year, by contributions from the county and the county boroughs, part of the expenses incurred by the board in the execution of their duties, and to divide the estimated amount to be raised for each year between the county and the county boroughs in proportion to their respective rateable values as ascertained under s. 33 of the Local Government Act, 1888:—

Held, that the provisions of the local Act were not affected by the Agricultural Rates Act, 1896, so that the board must still divide the estimated amount between the county and the county boroughs in proportion to their respective rateable values, and not according to their respective assessable values as ascertained under the Agricultural Rates Act, 1896, and the regulations of the Local Government Board made in pursuance of it.

Decision of the Divisional Court, [1899] 1 Q. B. 759, reversed. LANCASHIRE ASYLUMS BOARD *v.* MANCHESTER CORPORATION **C. A. 458**

4. —— *Hoardings—Advertising Contractor—Permitting Land to be used for the Exhibition of Advertisements—Rateable Occupation—Advertising Stations* (*Ruting*) *Act*, 1889 (52 & 53 *Vict. c.* 27), *s.* 3.

The appellant, an advertising contractor, under

RATES—*continued.*
an agreement with the builders of certain buildings then in course of erection, used the hoardings erected by them for the exhibition of advertisements. The appellant's name having been inserted in a valuation list as being the rateable occupier of the hoardings under s. 3 of the Advertising Stations (Rating) Act, 1889:—

Held, that he did not "permit" the "land" on which the hoardings were erected to be "used for the exhibition of advertisements" within the meaning of that section, and was not liable to be rated in respect thereof. BURTON *v.* ST. GILES' AND ST. GEORGE'S ASSESSMENT COMMITTEE
Div. Ct. 389

5. —— *Lairage — Exceptional Case — Structural Value — Rateable Value — Profit-earning Capacity—Evidence of Receipts and Expenditure —Admissibility of Evidence.*

The appellants, who were owners of lairages for the reception and slaughter of foreign cattle, appealed to quarter sessions against a poor-rate. The recorder found that there were no similar tenements in the neighbourhood with which a comparison could be made. He had evidence before him of structural value, and he admitted in evidence accounts shewing the receipts and expenditure of the defendants. On a case stated:—

Held, that as the ordinary test of the rental of similar properties could not be applied, and as the structural value alone would not embrace the profit-earning capacity of the premises, the evidence of receipts and expenditure was admissible and might be considered in conjunction with the structural value, and other circumstances of the case, in the determination of the gross estimated rental at which the premises should be assessed. MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD ASSESSMENT COMMITTEE - C. A. 143

6. —— *Railway—Exemptions—Land used as Railway for Public Conveyance—Liverpool Corporation Act*, 1893 (56 & 57 *Vict. c. clxxxi.*) (*Local*), *s.* 36 (*ii.*).

The Liverpool Corporation Act, 1893, s. 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance" shall be rated in respect of the same to the general rate leviable by the corporation in any greater proportion than one-fourth part of the net annual value. A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed, open on one side; and, on the other, with openings in the walls to admit trucks. Inside the shed were a number of railway lines, comprising sidings, and running alongside platforms, for the purpose of loading and unloading railway trucks with goods. All these lines were used for the conveyance of any goods sent by the public to or from the premises. The premises were some distance from the company's main line, and were connected therewith by a dock line belonging to the Mersey Docks and Harbour Board, who under statutory powers permitted the company to use such line, and by a tramway laid across a street by the company under a licence granted by the corporation under statutory powers. The company's premises were acquired

RATES—*continued.*
and laid out under powers conferred upon them by a private Act:—

Held, that the land used for the lines, sidings, and platforms inside the company's premises was not land "used as a railway made under the powers of an Act of Parliament for public conveyance" within the meaning of s. 36 of the Liverpool Corporation Act, 1893, and that the company were not entitled, with regard to those premises, to the partial exemption in respect of rating contained in that section.

Judgment of the Queen's Bench Division, [1899] 2 Q. B. 197, reversed. WILLIAMS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - C. A. 760

7. —— *Separate Assessment of Different Portions of Same Hereditament—Poor-rate.*

The mere fact that the different portions of one undivided hereditament are capable of commanding rents if let to different occupiers does not impose any obligation upon the rating authority to assess and rate the different portions separately.

Whether for rating purposes a particular area of land is to be treated as one hereditament or as more than one is a question of fact. NORTH EASTERN RAILWAY COMPANY *v.* YORK UNION
Div. Ct. 733

8. —— *Underground Sewers—Diminution of Value of Surface—Rateability.*

Where the surface of the soil through which an underground sewer runs was rateable before the sewer was constructed, the sewer is exempt from rating only if the surface is not diminished in value by reason of the construction. If the presence of the sewer restricts the uses to which the occupier of the surface can apply it, and thereby renders the surface of less value, the sewer, although underground, is rateable. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* NEWPORT ASSESSMENT COMMITTEE
Div. Ct. 365

—— Goods "taken in execution" — Duty of sheriff to pay rates - - - 111
See SHERIFF.

—— Quinquennial valuation—Alteration in value of hereditament—Onus of proof - 68
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RECEIPT—Money paid under compulsion of law —Want of bona fides - - 675
See MISTAKE.

—— Stamp—Scrip certificate—Payment by instalments—Receipts for future payments indorsed on certificate - - 166
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RECEIVING ORDER—Act of bankruptcy
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REFEREE—Trial before official—Application to Divisional Court—Leave to appeal 284
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REGISTRATION—Common lodging-house—Liability to penalty—Charitable institution—Non-registration - 401, 617
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See BILL OF SALE. 3.

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See REVENUE. 4.

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See LOCAL GOVERNMENT. 1.

—— Trustee in bankruptcy—Composition provided by debtor's father—"Amount realized by trustee" - - 5
See BANKRUPTCY. 4.

RENT—Distress—Privileged from—Bedstead—"Bedding" - - - - 729
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—— Distress for—Goods impounded on premises—Man in possession - - 100
See LANDLORD AND TENANT. 1.

—— Payable in advance—Apportionment on eviction - - - - 740
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REPAIRS—Covenant—Occupation by cestui que trust—Liability of cestui que trust for breach of trustee's covenant - 116
See LANDLORD AND TENANT. 3.

—— Highway—Repairable ratione tenuræ—Recovery of expense — Person liable — Owner not in occupation - - 1
See HIGHWAY. 1.

REVENUE—*Estate Duty—Contingent Settlement—"Settlement Estate Duty"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 1 (*h*), (*i*)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 4—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

Settled estate duty is, under s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, payable in respect of property only contingently settled, though, under s. 14 of the Finance Act, 1898, the duty will, if the contingency does not and cannot arise, be repaid.

Sect. 14 of the Finance Act, 1898, amounts to an adoption by the Legislature of the construction which was put upon s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, in *Attorney-General* v. *Fairley*, [1897] 1 Q. B. 698. ATTORNEY-GENERAL *v.* CLARKSON - - - - C. A. 156

2. —— *Estate Duty—Devise to Issue of Testator—Death of Devisee in Lifetime of Testator—Issue of Devisee Living at Death of Testator—Devise taking Effect as if Devisee had survived Testator—*

REVENUE—*continued.*

Property passing on Death—Wills Act, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 33—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s* 1 (*a*); *s.* 22, *sub-s.* 1 (*b*), *sub-s.* 2 (*a*).

By the Wills Act, 1837, s. 33, "Where any person, being a child . . . . of the testator, to whom any real . . . . estate shall be devised . . . . for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise . . . . shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary estate to trustees. This devise included the property devised by the father's will, and took effect by virtue of the Wills Act, s. 33. On the death of the father estate duty was paid on all the property which passed on his death, including that devised to his son. The Commissioners of Inland Revenue claimed estate duty on the property devised by the son to the trustees.

On appeal by the trustees, under the Finance Act, 1894, s. 10, to determine the duty payable:—

Held, by Darling J., that the property was property of which the son was, at the time of his death, competent to dispose, and therefore was property passing on the death of the son, within the meaning of the Finance Act, 1894, s. 2, sub-s. 1 (*a*):

Held, by Channell J., that, as the Wills Act gave the property to the devisees of the son as if the son had survived the father, it gave it subject to the same duties as if the son had survived the father:

Held, by the Court, that estate duty was payable by the trustees. *In re* SCOTT Div. Ct. 372

3. —— *Estate Duty—Policy of Life Insurance—Settled Property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which "passes on the death" of a person dying after the commencement of the Act. By s. 2, "property passing on the death" shall be deemed to include (sub-s. 1 (*d*)) any annuity or other interest purchased or provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. Sect. 3 exempts from estate duty property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.

A., shortly before his marriage, effected a policy of insurance on his own life for a sum payable on his own death to his intended wife, and assigned the policy to the trustees of a settlement made in consideration of the marriage. By that

REVENUE—*continued.*
settlement the principal moneys to be received under the policy were to be held by the trustees in trust for the wife for life and upon other trusts, and A. covenanted to keep up the policy and pay the premiums thereon during his life. He duly performed his covenant, and died after the commencement of the Act, leaving his wife surviving:—

Held, that the sum payable under the policy on A.'s death was an "interest purchased or provided by the deceased" within the meaning of s. 2, sub-s. 1 (*d*); that the exemption from duty contained in s. 3 did not apply; and, therefore, that on A.'s death estate duty was payable in respect of that sum. ATTORNEY-GENERAL *v.* DOBREE - - - - **Div. Ct. 442**

4. —— *Estate Duty—Property passing on Death—Interest ceasing on Death—Settled Property—Surrender of Life Interest to Remainderman—Death of Life Tenant within Twelve Months—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 7, *sub-s.* 7.

Where the tenant for life of settled property has released the life interest in favour of the remainderman and dies within twelve months of such release, estate duty is not payable by the remainderman on the principal value of the property under s. 2, sub-s. 1 (*c*), and s. 7, sub-s. 7, of the Finance Act, 1894.

Decision of the Divisional Court, [1899] 2 Q. B. 238, reversed. ATTORNEY-GENERAL *v.* DE PRÉVILLE - - - - **C. A. 223**

5. —— *Income Tax—Deduction of Income Tax from Interest or Annuities—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60, 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Scheds. A, D—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The London County Council had deducted income tax under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, from dividends paid by them on their consolidated stock. These dividends were paid out of the council's Consolidated Loans Fund, which was by statute made applicable in the first place to their payment. That fund consisted of (among other things) interest which had been received by the council on loans made by them to other local authorities, and from which, in accordance with the subsection, income tax under Sched. D had been deducted before payment, of the rents and profits of land on which income tax under Sched. A had been paid, of the proceeds of sales of property, and of money raised by rates:—

Held, that the county council were entitled to retain a proportion of the income tax which they had deducted corresponding to the proportion in which the dividends on the consolidated stock had been paid out of moneys on which income tax under Sched. D had been already paid; but that they were not entitled to retain a proportion of the deducted income tax corresponding to the proportion in which the dividends had been paid out of moneys charged with income tax under Sched. A.

Question as to the proportion in which the dividends on the council's consolidated stock should be deemed to have been paid out of the

REVENUE—*continued.*
interest received by the council on loans discussed.

Decision of the Divisional Court, [1899] 2 Q. B. 226, affirmed. ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL - - **C. A. 192**

6. —— *Income Tax—Life Insurance Company — Participating Policy-holders — Return of Premium by way of Bonus—Annual Profits or Gains—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sched. D.*

A life insurance company had a capital divided into shares, the dividends on which were limited by the articles of association to 7 per cent. The powers of the company were vested in a board of directors elected by the shareholders; the board appointed the officers of the company, and by the officers determined the rates of premium and the terms of insurance, and generally managed the affairs of the company. The company issued participating policies, and by the articles the insurance business was to be conducted on the mutual plan. The earnings and receipts over and above the dividends, losses, and expenses were accumulated from year to year, and every five years a balance was struck and the net surplus in the hands of the company, after deducting an amount sufficient to cover all outstanding risks and obligations, was, in compliance with the articles of association, divided among the holders of participating policies, each policy-holder being credited with an equitable share of such surplus:—

Held, that the surplus returned or credited to the policy-holders was "annual profits or gains," and was assessable to income tax.

Last v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, and *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered.

Decision of the Divisional Court, [1899] 2 Q. B. 439, affirmed. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* BISHOP **C. A. 177**

7. —— *Stamp — Company — Debenture—Redemption on Contingency—"Marketable Security"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

A limited company issued a series of debentures for 100*l.* each, redeemable at par by annual drawings on and after July 1, 1902. Each debenture contained a stipulation that the company might, at any time after July 1, 1900, on giving six months' previous notice in writing to the registered holder, redeem the debenture at 103*l.*, which sum, at the expiration of the six months, should become payable as if the same were the amount of the principal moneys thereby secured:—

Held, that ad valorem stamp duty was chargeable on each debenture under the head of "Marketable Security" in the 1st schedule to the Stamp Act, 1891, upon 100*l.* only, as being the "money secured" by the debenture within the meaning of the schedule.

Decision of the Divisional Court, [1899] 1 Q. B. 345, reversed. KNIGHTS DEEP, LIMITED *v.* INLAND REVENUE COMMISSIONERS - **C. A. 217**

8. —— *Stamp—Conveyance on Sale—Goodwill—Contract "made" in the United Kingdom—"Equitable Interest in Property"—"Property*

REVENUE—*continued.*

locally situate out of the United Kingdom"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except . . . . (inter alia) property locally situate out of the United Kingdom" is chargeable with the same ad valorem duty as if it were a conveyance on sale.

A contract is "made," within the meaning of that section, in that country in which the signature of the last necessary party to it is affixed.

A contract for the sale of an option to purchase property at a particular price is not a contract for the sale of an "equitable estate or interest in any property" within the section.

Where the goodwill of a business is sold together with the premises where the business is carried on for a lump sum the goodwill is primâ facie annexed to the premises, and, therefore, if the business premises so sold are situate abroad, and there are no circumstances to rebut the presumption of annexation, the goodwill also will be treated as "property locally situate out of the United Kingdom" within the meaning of that section.

West London Syndicate v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507, distinguished. Muller & Co.'s Margarine, Limited *v.* Inland Revenue Commissioners - - **C. A. 310**

9. —— *Stamp*—"*Conveyance or Transfer on Sale*"—*Assignment of Leaseholds*—*Consideration*—*Rent*—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 57, *Sched. I.*

The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned and conveyed two of the houses, in consideration of 503*l.*, for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, and to keep the assignor indemnified in respect of it, and the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, and to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—

Held, that, for the purpose of fixing the ad valorem duty chargeable under the heading "Conveyance or Transfer on Sale of any Property" in Sched. I. of the Stamp Act, 1891, the payment of rent by the assignee was not part of the consideration for the assignment, and that duty was chargeable upon the 503*l.* only.

Decision of the Divisional Court, [1899] 1 Q. B. 335, affirmed. Swayne *v.* Inland Revenue Commissioners - - - - **C. A. 172**

10. —— *Stamp—Scrip Certificate—Payment by Instalments—Receipts for Future Payments indorsed on Certificate—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Schedule*, "*Receipt*," *Exemption* 11.

A scrip certificate duly stamped stated that the bearer was entitled to 100*l.* stock of the Cape of Good Hope after payment of two several sums

REVENUE—*continued.*

of 40*l.* at specified dates: Receipts were indorsed on the certificate applicable to the payment of the two instalments at the specified dates:—

Held, affirming the judgment of a Divisional Court, that the receipts acknowledged the receipt of the consideration money expressed in the certificate on which they were indorsed, and were exempt from duty under title "Receipts," Exemption 11, in the schedule to the Stamp Act, 1891. London and Westminster Bank *v.* Inland Revenue Commissioners - - **C. A. 166**

REVISING BARRISTER — Jurisdiction—Parochial electors' list—Ownership and occupation claims - - - **103**
See Parliament.

RULES OF SUPREME COURT — Order LXV. (*Costs*), r. 1 - - - - **357**
See Practice. 3.

SALE—Conveyance on — Stamp — Goodwill — Contract "made" in the United Kingdom - - - - - **310**
See Revenue. 8.

—— Licensed hawker—Sale by, of goods for which licence unnecessary - **472**
See Market.

—— Otherwise than by weight - - **288**
See Bread.

—— Poisons—Order taken by agent—"Seller"
See Pharmacy Acts. **454**

SALE OF GOODS—*Contract—Sale by Description—Implied Condition — Acceptance — Passing of Property—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 13, 17, 35.

The expression "contract for the sale of goods by description," in the Sale of Goods Act, 1893, s. 13, applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller.

The plaintiff agreed to sell and the defendant to buy a reaping machine, which the defendant had never seen, and which the plaintiff stated to have been new the previous year, and to have been used to cut only fifty or sixty acres. The machine was delivered, and shortly afterwards the defendant wrote complaining that it did not correspond with the plaintiff's statements. After some further correspondence the defendant returned the machine.

In an action to recover the price:—

Held, that there was a contract for the sale of goods by description, within the meaning of the Sale of Goods Act, 1893, s. 13, and therefore, by that section, there was an implied condition that the goods should correspond with the description, that there had been no acceptance of the machine by the defendant, within the meaning of s. 35, that the property had not passed to the defendant, within the meaning of s. 17, and the plaintiff was not entitled to recover. Varley *v.* Whipp **Div. Ct. 513**

—— Ratification—Undisclosed principal - **629**
See Contract.

SCAFFOLDING—Workmen's Compensation Act.
See Employer and Workman. 10. **575**

SCHOOL BOARD—*Disqualification of Member—"Concerned in Work done under authority of Board"—Sale of Materials to Contractor with Board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 34.

By s. 34 of the Elementary Education Act, 1870, a member of a school board who (inter alia) "shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board" is liable to a penalty, and his office becomes vacant.

The respondent, a member of a school board, sold sand and gravel to a builder who had entered into a contract with the board for the building of a school; at the time of the sale the respondent was aware that the sand and gravel were intended to be used (as they were in fact used) in the building of the school:—

Held, that the respondent had been concerned in work done under the authority of the board, and had therefore been guilty of an offence under the section. BARNACLE *v.* CLARK **Div. Ct. 279**

SCRIP CERTIFICATE — Stamp — Payment by instalments — Receipts for future payments indorsed on certificate - **166**
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SHERIFF—*Seizure of Goods of Person liable to pay Rates—Goods "Taken in Execution"—Duty of Sheriff to pay Rates*—35 *Geo.* 3, *c.* 73, *s.* 195.

By 35 Geo. 3, c. 73, s. 195, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the raet shall have been paid, the sheriff upon demand by the rate-collector is "directed and required in the first place" to pay the rate to the collector.

A sheriff seized under a fi. fa. the goods of a judgment debtor who was at the time liable to pay to the vestry as the rating authority of the parish a certain rate made in conformity with the Act. A demand was made on the sheriff by the rate-collector for the amount of the rate; but the sheriff, having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate:—

Held, that the sheriff was liable to the vestry for the rate. ST. MARYLEBONE VESTRY *v.* SHERIFF OF LONDON - - - **Bigham J. 111**

SHIPPING—*Bill of Lading—Description of Goods—"Marked and Numbered as in the Margin"—Mistake—Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

By the Bills of Lading Act, 1855, s. 3, "Every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped . . . ."

A bill of lading described goods as "marked and numbered as in the margin." Some of the goods shipped were marked and numbered differently from the description in the margin, but this marking and numbering did not affect or denote the substance, quality, or commercial value of the goods.

In an action for damages for short delivery, brought by the consignee against the shipowners' agents, who had signed the bill of lading:—

Held, that the defendants were not prevented, by the Bills of Lading Act, 1855, s. 3, from shewing that there was a mistake in the marginal description, and that these goods formed part of the quantity set forth in the bill of lading, and were shipped as part of the plaintiff's consignment.

Bradley v. *Dunipace*, (1862) 1 H. & C. 521, distinguished. PARSONS *v.* NEW ZEALAND SHIPPING COMPANY - - - **Kennedy J. 714**

2. —— *Charterparty—Advance Freight—Payment Three Days after Sailing—Destruction of Part of Cargo before Sailing by Excepted Peril.*

By a contract of charterparty the defendants contracted to load on board the plaintiffs' ship a full and complete cargo at a certain rate of freight per ton "on the quantity to be delivered to the consignees." "The freight to be due and paid as follows: Two-thirds in cash three days after sailing, ship lost or not lost, the balance on unloading and right delivery of the cargo." After the defendants had loaded a part of the cargo a fire broke out on board and destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charterparty. The defendants subsequently loaded the balance of the cargo, and the ship sailed. Three days after sailing the plaintiffs claimed payment of advance freight on two-thirds of the full cargo shipped:—

Held, that the plaintiffs were not entitled to

payment of advance freight on the part of the cargo destroyed.

Judgment of Lord Russell of Killowen C.J., [1899] 1 Q. B. 193, affirmed. WEIR & Co. *v.* GIRVIN & Co. - - - - **C. A. 45**

3. —— *Charterparty—Ballast—Obligation of Shipowners to Supply.*

By a charterparty, which did not involve a demise or parting with possession of the ship by the shipowners, she was, in consideration of a certain sum per month, to be placed at the disposal of the charterers to be employed by them in the conveyance of lawful merchandise $\frac{\text{and}}{\text{or}}$ passengers between certain ports, and it was stated that she was let for the sole use and benefit of the charterers for two or three round voyages at charterers' option commencing not later than a day specified, by which day she was to be placed with "clear holds" at the disposal of the charterers at the port of New York, they having the "whole reach or burthen" of the vessel, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores, and the vessel was not to be required to load more than she could reasonably stow and carry over and above her tackle, provisions, stores, and fuel:—

Held, by the Court of Appeal (A. L. Smith L.J., Collins L.J., and Vaughan Williams L.J., the last mentioned doubting), that the terms of the charterparty did not rebut the ordinary implication in the case of a charterparty by which the obligation of supplying any ballast that may be necessary for the safe navigation of the ship rests upon the shipowner. WEIR & Co. *v.* UNION STEAMSHIP COMPANY - - - **C. A. 28**

4. —— *Charterparty—"Cargo of say about 2800 Tons"—Contract to load a—Construction of Charterparty.*

By a contract of charterparty the charterer undertook to load "a cargo of ore, say about 2800 tons." The actual capacity of the ship was 2880 tons. The charterer loaded 2840 tons:—

Held, that he had satisfied his contract.

Morris v. *Levison*, (1876) 1 C. P. D. 155, distinguished. MILLER *v.* BORNER & Co.

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5. —— *Charterparty—"Cargo of Steam Coal as ordered by Charterers"—Colliery Guarantee—Strike Clause—Colliery on Strike.*

It was agreed by a charterparty that the ship should sail to Cardiff, and proceed to such loading berth as the freighters might name, and should there load "a cargo of steam coal as ordered by the charterers," which they bound themselves to ship, except in the event of (inter alia) strike of shippers' pitmen; the vessel to be loaded as customary, "but subject in all respects to the colliery guarantee, in ——— colliery working days as may be arranged, any claim for demurrage in loading to be settled with colliery direct." The charterers, for the purpose of fulfilling their obligations under the charterparty, contracted with a colliery for a cargo of steam coal, subject to the usual exception as to strikes. Subsequently a strike of pitmen took place, which extended to 85 per cent. of the South Wales collieries, including the before-mentioned colliery. The charterers, in performance of their obligation under the charterparty, tendered to the shipowners the guarantee of that colliery, by which the colliery proprietors undertook to load the ship in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to the colliery guarantee, as not being in accordance with the charter, on the ground that the colliery was then on strike. The strike still continuing for three months after the arrival of the ship at Cardiff, her loading was in consequence delayed for that period. Steam coal might have been obtained from other collieries in the district which remained working during the strike, although at a very high price.

In an action by the shipowners against the charterers for damages for the detention of the ship:—

Held, by the Court of Appeal (affirming the judgment of Bigham J.), that the shipowners were not entitled to object to the colliery guarantee as not being in accordance with the charterparty, and that the action was not maintainable. DOBELL & Co. *v.* GREEN & Co. - **C. A. 526**

6. —— *Charterparty—"Cargo to be taken from Alongside at Charterers' Risk and Expense"—"Any Custom of the Port notwithstanding"—Extent of Exclusion of Custom—Construction of Charterparty.*

By a charterparty a cargo of timber was to be shipped at a Baltic port and delivered at the Surrey Commercial Docks, London. The charterparty contained a clause, "The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port notwithstanding:—

Held, that the exclusion of the custom of the port related to the whole clause, and that the shipowners were therefore only bound to deliver over the ship's rail, and were not bound by any custom of the port of London requiring a shipowner to do work outside the ship. BRENDA STEAMSHIP COMPANY *v.* GREEN - **C. A. 518**

—— Dock—Loading from—Steam-winch on ship in dock loading from lighter alongside—Compensation - - - **491**
See EMPLOYER AND WORKMAN. 4.

—— Dock—Repairs done to ship in—"Shipbuilding" yard—Compensation - **498**
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—— Dock-master — Control of — Obstruction — West India Docks - - - **394**
See DOCK.

SHOP—*Hotel—Domestic Servant—Public-house—Shop Hours Act*, 1892 (55 & 56 *Vict. c.* 62).

By the Shop Hours Act, 1892, provision is made as to the number of hours in any one week during which young persons under eighteen years of age may be employed in or about a shop, and by s. 9 "'shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses and refreshment houses of any kind."

A building which is used solely as a hotel

SHOP—*continued.*
and restaurant for the accommodation of guests, and which has no bar or counter for the sale of intoxicating liquors, and is not in the ordinary sense of the term a public-house, but which is licensed as an inn under 9 Geo. 4, c. 61, for the sale of intoxicating liquors by retail, is a "shop" within the meaning of the above Act.

A page-boy in a hotel, who sleeps on the premises, and who is principally employed as a messenger, but partly also in assisting to dust the reception-rooms, is not within the exemption in s. 10 in favour of "any person wholly employed as a domestic servant." SAVOY HOTEL COMPANY *v.* LONDON COUNTY COUNCIL - **Div. Ct. 665**

SOLICITOR — *Costs — Taxation — Solicitor Employed at fixed Annual Salary—Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

A public body employed a solicitor as their clerk at a fixed annual salary, for which (inter alia) he was to prosecute and defend all legal proceedings taken by or against them. Out of pocket expenses were to be paid for by them. In an action brought against them, judgment was entered for them with costs, to be taxed as between solicitor and client. On taxation the registrar struck out all items, except out of pocket expenses paid by the solicitor, on the ground that all work done by him in the conduct of the action was covered by his salary:—

Held, that the taxation was wrong, and ought to be reviewed. HENDERSON *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL - **Div. Ct. 434**

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3 Geo. 4, c. cvi., s. 4—*Sale of Bread* - **288**
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STOCK EXCHANGE—*Defaulter—Official Assignee—Assignment of Assets—Set-off—Rules and Regulations of Stock Exchange.*

It is provided by the rules and regulations of the Stock Exchange that two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter on the Stock Exchange his books of account and a statement of the sums owing to and by him and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange; and by rule 176 "the assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible":—

Held, that the term "the assets" in the above-mentioned rule means all the assets of the defaulter; and that, when the rule is brought into operation, the effect is to create an assignment of the assets of the defaulter to the official assignee.

A member of the Stock Exchange was indebted to the defendants. He became a defaulter on the Stock Exchange, and the liquidation of his affairs was undertaken by the plaintiff, as official assignee, under the above-mentioned rules. For the purposes of the liquidation he was authorized by the plaintiff to sell, and accordingly sold, certain shares standing in his name to the defendants, who were not members of the Stock Exchange, but who knew his position and that of the plaintiff as official assignee. The plaintiff having sued the defendants for the price of the shares:—

Held, that the action was maintainable, and that the defendants were not entitled to a set-off in respect of their debt. RICHARDSON *v.* STORMONT, TODD & Co. - - - C. A. 701

STOP ORDER — After-acquired property of bankrupt — Priority — Assignment by bankrupt - - - 130, n.
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SUNDAY OBSERVANCE—*Exercising "Worldly Labour, Business, or Work" on Sunday—Barber—29 Car. 2, c. 7, s. 1.*

A barber who shaves customers on Sunday is not a "tradesman, artificer, workman, or labourer, or other person whatsoever" within the meaning of 29 Car. 2, c. 7, s. 1, which prohibits those persons from exercising any worldly labour, business, or work of their ordinary callings upon the Lord's Day (works of necessity and charity only excepted). PALMER *v.* SNOW - Div. Ct. 725

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TRESPASS — Action of — Highway — Public authorities protection—Costs as between solicitor and client - - 535
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—— Use of highway otherwise than as such
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TROVER—*Conversion of Document—Damages—Measure of—Non-negotiable Instrument—Money had and received.*

The plaintiffs received from a company, which was indebted to them, an order addressed to the company's bankers for the payment of the

TROVER—*continued.*

amount of their debt. The order was not a cheque within the meaning of the Bills of Exchange Act, 1882, because the payment was made conditional upon signature of a receipt appended to the order. The order was stolen from the plaintiffs, the receipt being then unsigned. It was subsequently handed to the defendants, a banking company, with a forged indorsement and receipt thereon, for collection on behalf of a customer of theirs whom they credited with the amount of it. It did not appear that the customer knew that the order had been stolen. The order was presented by the defendants to the bank to which it was addressed, and the amount specified therein was thereupon paid by that bank to them. Subsequently, the plaintiffs gave notice to the defendants that the order was stolen from them, and claimed the amount received by the defendants upon it. Nothing had in the meantime taken place to debar the defendants from cancelling the credit given to their customer as before mentioned:—

Held, that the plaintiffs were entitled to recover the amount received by the defendants upon the order as money received for the plaintiffs' use.

Query, whether they were entitled to recover that amount as damages for the conversion of the document. BAVINS, JUNR. & SIMS *v.* LONDON AND SOUTH WESTERN BANK - - **C. A. 270**

2. —— *Waiver of Tort—Wrongful Sale of Goods—Joint Tortfeasors—Action against One in Trover and for Money had and received—Compromise by accepting Proceeds of Sale—Action of Trover against the Other—Election.*

The plaintiff's servant wrongfully sold goods of his master to the defendant, who knew that the servant was improperly dealing with them, and the servant paid the proceeds of the sale into his account at his bank. The plaintiff brought an action against the servant and the bank, claiming as against the servant damages for conversion of the goods, and in the alternative for money had and received, and as against the servant and the bank an injunction to restrain them respectively until the trial of the action from drawing out or parting with the sum of 1500*l.* then standing to the servant's credit at the bank. The plaintiff applied for an interim injunction as above upon an affidavit that 1500*l.* at the least could be specifically traced to the servant's account as being moneys paid by the defendant for the goods wrongfully sold. An interim injunction was granted, but no further steps in the action were taken, an agreement being arrived at between the plaintiff and the servant that 1125*l.* out of the 1500*l.* then at the bank should be paid to the plaintiff in full settlement of all claims against the servant, without prejudice to the plaintiff's claim against the defendant. This agreement was embodied in a judge's order, but no judgment was signed. Before the agreement was made the plaintiff had brought an action against the defendant claiming damages for the conversion of the goods:—

Held, that the plaintiff had not, by his proceedings in the former action and by his dealings with the servant therein, elected to affirm the sale and to waive the tort, and the action against the defendant was maintainable. RICE *v.* REED **C. A. 54**

TROVER—*continued.*

TRUSTEE—Covenant to repair—Occupation by cestui que trust—Liability of cestui que trust for breach of trustee's covenant *See* LANDLORD AND TENANT. 3. **116**

TRUSTEE IN BANKRUPTCY — Bankruptcy Practice. *See* Cases under BANKRUPTCY.

ULTRA VIRES—Trustee's remuneration—Resolution of creditors—Composition provided by debtor's father—"Amount realized by trustee" - - - - **5** *See* BANKRUPTCY. 4.

UNDERGROUND SEWERS — Rateability — Diminution of value of surface - **365** *See* POOR-RATE.

"UNDERTAKER"—Workmen's Compensation Act - - - - **770, 777** *See* EMPLOYER AND WORKMAN. 11, 12.

UNDISCHARGED BANKRUPT—After-acquired property — Right of trustee — Maintenance of bankrupt - **122, 130, n.** *See* BANKRUPTCY. 5, 6.

VACCINATION — *Vaccination Order—Non-compliance with Order—Burden of Proof—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

Upon the hearing of a summons under s. 31 of the Vaccination Act, 1867, against the parent of a child for non-compliance with an order of justices directing him to have his child vaccinated, the burden of proving non-compliance is upon the prosecution. Evidence that the certificate of vaccination required by the Act has not been received by the proper officer is primâ facie evidence from which non-compliance with the vaccination order may properly be presumed. OVER *v.* HARWOOD - - - **Div. Ct. 803**

VAGRANCY—Cost of appeal to quarter sessions —Payment by treasurer of county or borough - - - - **291** *See* JUSTICES.

VALUATION LIST—Quinquennial valuation—Alteration in value of hereditament—Onus of proof - - - **68** *See* LONDON. 2.

VALUATION (METROPOLIS) ACT, 1869—Gross value—Artizans' dwellings — Cost of lighting and cleaning common stair **138** *See* RATES. 2.

VENDOR AND PURCHASER — *Commission — Agreement by Vendor to pay Commission to Purchaser's Agent—Non-disclosure of Agreement by Vendor—Right of Purchaser to recover Commission from Vendor.*

The plaintiff, who was the owner of a mine, agreed with a person who was in fact, though the plaintiff did not then know it, a director of and agent for the defendants, a limited company, that the director should have an option of finding

VENDOR AND PURCHASER—*continued.*
a purchaser for the property, and should, if successful, be paid as commission 10 per cent. of the price obtained. The director arranged a sale to the defendants, but before the contract was entered into, or the commission had become payable, the plaintiff became aware of the director's position with regard to the defendants:—

Held, that, the plaintiff having completed the contract without disclosing to the defendants, as purchasers, the agreement to pay commission to their agent, any part of the agreed commission remaining in the plaintiff's hands could be recovered from him by the defendants.

Per Collins L.J.: The money could be recovered from the plaintiff as money had and received to the defendants' use.

By a second agreement between the plaintiff and the director, made before the commission became due, an immediate payment of a sum less than that originally agreed on was substituted. The defendants subsequently discovered the existence of the two agreements as to commission, and the payment to the director, and they demanded of and received from him, in satisfaction of all claims against him, the amount he had received from the plaintiff:—

Held, that the defendants were not bound by the agreement as to the reduction of the amount of commission, and that, notwithstanding that agreement and their receipt from the director of the reduced amount of the commission, they were entitled to recover the balance from the plaintiff. GRANT *v.* GOLD EXPLORATION AND DEVELOPMENT SYNDICATE, LIMITED - - - C. A. 233

2. —— *Contract for Sale—Lease of Public-house—Condition to be performed by Vendor—Time during which Condition may be performed—Absence of Express Stipulation—Date of Completion.*

The plaintiff agreed to purchase from the defendant the lease of a public-house on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount of money remaining on mortgage as was then due. A date was fixed for completion and a deposit paid, which was to be forfeited if the sale went off through the default of the plaintiff. At an interview between the plaintiff, the defendant, and the mortgagee, the latter would only agree to a lesser amount remaining on mortgage. The plaintiff thereupon treated the contract as at an end. Subsequently, and before the date fixed for completion, the defendant obtained the consent of the mortgagee to the full amount of the mortgage debt remaining on mortgage, but the plaintiff refused to proceed with the purchase. In an action to recover the deposit:—

Held, that, in the absence of circumstances which would justify the plaintiff in treating the refusal of the mortgagee as final, or of an agreement express or implied that it should be so treated, the defendant had until the date fixed for the completion of the contract in which to perform the condition by obtaining the consent of the mortgagee; that the contract had therefore gone off through the default of the plaintiff; and that he could not recover the deposit. SMITH *v.* BUTLER - - - - - C. A. 694

WAGERING—Agreement by way of—Recovery of deposit by stakeholder - - 744
See GAMING.

WAIVER—Tort—Joint tortfeasors—Compromise by accepting proceeds of sale—Action of trover against the other—Election 54
See TROVER. 2.

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WEIGHT—Sale otherwise than by weight 288
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WILL—Estate duty—Property passing on death—Devise taking effect as if devisee had survived testator - - - 372
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—— "Bedding" - - - - 729
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—— "Debtor" - - - - 541
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—— "Factory" - - - - 498
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—— "Mutual dealings" - - - 546
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—— "Seller" - - - - 454
See PHARMACY ACT.

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—— "Undertaker" - - - 770, 777
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—— "Wharf" - - - - 609
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